86-1153

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1986

FBK REALTY CORP.,

Petitioner,

against

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

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Question Presented

Is a state zoning provision facially unconstitutional as constituting a taking of property without compensation or a deprivation of property without due process of law where it precludes issuance of any Alteration Permit for a given property upon finding of past "harassment" of residential tenants by the owner of the property (1) where an Alteration Permit is a prerequisite for any substantial repair or improvement of the property; (2) where "owner" is defined as *anyone* in the prior chain of title, in whose acts the present owner may not have participated and of which he may have neither actual nor constructive knowledge; and (3) where the prohibition against issuance of an Alteration Permit runs with the property *forever*, rendering it unsaleable?

List of Parties

The parties to the proceedings below were the petitioner FBK Realty Corp., a corporation of the State of New York, and Anthony Gliedman, former Commissioner of the Department of Housing Preservation and Development of the City of New York. The present respondent is Mr. Gliedman's successor as Commissioner, Paul A. Crotty.

Petitioner FBK Realty Corp. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

FBK REALTY CORP.

Petitioner,

v.

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

The petitioner FBK Realty Corp. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Department, entered in this proceeding, originally captioned *FBK Realty Corp., Petitioner v. Anthony Gliedman, Commissioner, etc., Respondent,* on December 3, 1985.

Opinions Below

The opinion and decision of the Department of Housing Preservation and Development of the City of New York is reprinted in the appendix hereto, p. 1a, *infra.* That opinion was confirmed, without opinion, on direct review pursuant to Section 7801, *et seq.* of the New York Civil Practice Law and Rules ("C.P.L.R.") by the New York Supreme Court, Appellate Division, First Department ("Appellate Division"), whose judgment is reprinted in the appendix hereto, p. 66a, *infra.*

The within petitioner appealed directly, as of right, to the Court of Appeals of the State of New York, which dismissed the appeal. Successive motions for leave to appeal to the Court of Appeals were denied, respectively,

by the Appellate Division and the Court of Appeals itself. Such dismissal and denials are reprinted in the appendix hereto, pp. 70a, 82a, and 92a, *infra*, respectively.

Jurisdiction

Jurisdiction of this Court to review the judgment of the Appellate Division is invoked under 28 U.S.C. Section 1257(3), which provides for *certiorari* to review state statutes as repugnant to the Constitution of the United States.

Statute Involved

Section 96-109 of the Zoning Resolution of the City of New York:

> Prior to the issuance of an alteration permit by the Department of Buildings for an alteration other than an incidental alteration for a *building* containing *residential uses* within the Preservation Area, the Administrator of Housing and Development shall certify to the Department of Buildings:
>
> (a) That prior to evicting or otherwise terminating the occupancy of any tenant preparatory to alteration, the owner shall have notified the Administrator of Housing and Development of his intention to alter the *building*;
>
> (b) That the eviction and relocation practices followed by the owner of the *building* satisfy all applicable legal requirements and that no harassment has occurred.

(Italics in original as denoting terms defined elsewhere in Zoning Resolution.)

Statement of the Case

Petitioner FBK Realty Corp., a New York corporation ("FBK"), contracted, on or about August 30, 1983, to purchase the land and building known as and located at 468 West 47th Street, New York, New York (the "Premises"). The seller of the Premises was Nirco Investors Corp. FBK had and has no business or other connection whatsoever with Nirco or with any prior owner of the Premises, except that of purchaser to seller. A title search showed that the Premises had been free of complaints or findings of harassment of residential tenants of the Premises.

In view of the location of the Premises in the "Special Clinton District" on the west side of Manhattan, as defined in Section 96-00, *et seq.* of the Zoning Resolution of the City of New York, an area of Manhattan previously known as "Hell's Kitchen," FBK applied to the Department of Housing Preservation & Development of the City of New York ("HPD"), of which the respondent Paul A. Crotty is the Commissioner, pursuant to Section 96-109 of the Zoning Resolution, for a Certificate of No Harassment, a mandatory prerequisite for issuance of an Alteration Permit by the New York City Department of Buildings.

The Record in this matter shows that HPD interprets Section 96-109 such that an owner of property located in the Special Clinton District must prove that no "harassment" of residential tenants has taken place at the property at any time, by himself or by anyone else. HPD's position is that it makes no difference that the owner himself had nothing to do with any acts of alleged "harassment," or that he is unconnected with any prior alleged acts of "harassment" of any prior owner, or that he has no real or even constructive notice of such prior acts, if any. Indeed, an owner's stated and unequivocal intention to improve the property for the benefit of present and prospective

residential tenants, and his efforts and expenditures in that regard, are deemed equally irrelevant.

Under Section 96-109, if "harassment" has taken place at the property, at any time, by anyone, regardless of the lack of connection to the present owner, a Certificate of No Harassmant must be refused. Without such certificate the owner can never receive an Alteration Permit with respect to his property. He must own the property with no legal ability to improve it, or even to upgrade essential systems for the benefit of the residential tenants. This situation persists, as a matter of law, forever. Since Section 96-109 thus requires that, in perpetuity, no improvement can be made, the property has, as a practical matter, no resale value.

In May, 1984, notwithstanding the fact that FBK had never evicted or relocated tenants, and notwithstanding FBK's guarantee that tenants have the unqualified right to remain as rent-controlled tenants under local law for as long as they wished, HPD issued a determination of "reasonable cause" to believe that "harassment" had occurred at the Premises. A hearing was scheduled, therefore, to resolve the listed allegations of harassment as set forth in a "Notice of Hearing" dated July 5, 1984.

On July 18, 1984, a hearing was held before the office of Administrative Trials and Hearings of the City of New York, Joel I. Sosinsky, HPD's Administrative Law Judge, presiding. HPD produced only one witness concerning acts of alleged harassment, a tenant whose testimony showed that certain prior owners of the Premises had failed or had been unable to provide certain services and that, basically, over the last 15 years, the Premises had deteriorated along with the entire surrounding neighborhood.

HPD's witness described how the Premises had allegedly been permitted to deteriorate during the period beginning

in 1976, when the Premises was substantially damaged by a fire. At that time the firefighters broke into the witness' apartment, removed her window, chopped up her door and removed the skylight from the hallway. Those conditions were repaired in some four to six weeks. The roof was repaired later. The alleged failures to provide building services or maintenance referred to the period between 1976 and 1983, prior to the purchase of the Premises by the Petitioner.

Nirco Investors Corp. purchased the Building in July 1983. Shortly after Nirco took title, new doors and locks were installed on apartments, as were a series of locks for the front door of the Building which, unfortunately, proved unresistant to intruders, due to the fact that the Premises are across the street from a park inhabited by drug addicts. New windows were installed and the basement cleaned.

In October 1983 the Premises were purchased from Nirco by FBK. HPD's witness contrasted favorably the conditions in the Premises subsequent to FBK's ownership with those preceding, by testifying that the new owners (1) put a new lock on the vestibule making it necessary to have a key to gain access to the Building; (2) began replastering her apartment (3) provided a new refrigerator, toilet and completely new bathroom; (4) patched the roof; and (5) had replaced hallway lightbulbs with working fluorescent lights. The tenant denied that any of FBK's principals had made any statements or done any acts to encourage her to vacate her apartment.

Ted Reed, Jr., an architectural consultant who testified on FBK's behalf, testified that the Premises, located in a physically run-down area, surrounded by buildings requiring alteration and updating, was built around the turn of the century and that the present antiquated DC electrical system had to be replaced, along with the plumbing, which was described as being beyond repair.

Mr. Reed identified FBK's building plans and testified that the plans proposed new partitions, plumbing, heating and electrical systems and new double-pane windows. Such renovation was intended to work "around" the two occupied apartments, so that the present tenants would not have to vacate.

Mr. Reed described the repair of the heating system as resulting in a monumental "Catch 22." One of the "harassment" allegations against FBK was the failure to provide adequate heat and hot water. Correction of this problem necessarily involved replacement of the boiler. Such replacement required an Alteration Permit, however, which could not issue because of the intervening allegations of "harassment." Faced with such a circular, insoluble dilemma, FBK went ahead and did what was necessary, by installing a boiler without permit. The Premises was thereupon cited with a Building Code violation for illegal installation of the new boiler, *i.e.*, without an Alteration Permit!

Mr. Reed testified that, if no permit could be issued with respect to re-vamping the electrical and plumbing systems, and the Premises continued to deteriorate and increase in dangerousness, the same "Catch 22" would necessarily apply to any efforts to renovate such systems.

Mr. James Hefelfinger, FBK's President, testified that, immediately upon closing title to the Premises, FBK had changed the front door lock cylinder and gave new keys to the tenants and a new electrical hot water system was installed. With respect to the apartment occupied by HPD's sole witness, various emergency repairs were done quickly, including replacement of an old watercloset with a modern toilet, upgrading of the electrical circuitry, installation of a new refrigerator and the installation of new apartment door locks and "saddle," along with repairs to the roof of the apartment, and repainting and replastering of the apartment. All of these acts were obviously inconsistent with an intention on the owners' part to harass the tenant into vacating the apartment.

It was and is FBK's intention to rehabilitate the Building and renovate vacant apartments and common areas. Mr. Hefelfinger explained that this would take some time in view of the administrative roadblock contained in Zoning Resolution Section 96-109.

What made the roadblock particularly egregious was that neither FBK nor any of its principals had ever committed or attempted any acts which would indicate to anyone that they wanted the present tenants of the building to vacate. On behalf of FBK, Mr. Hefelfinger guaranteed the tenants the right to remain as rent-controlled tenants as long as they wished, and he did so on the record at the hearing.

Mr. Hefelfinger observed that the immediate area consisted of housing stock predating the turn of the century and a large population of vagrants and drug addicts. Neither the owners' principals nor employees had seen any intruders inside the Building, or, indeed, anyone other than HPD's tenant witness. When the owners had been told of derelict problems, they have called the police and have urged the tenants to do the same. Following some on-site inspections, FBK had tinned up windows in vacant units adjacent to fire escapes, and resecured units showing evidence of break-ins, and had done everything in their power to keep squatters out of the Building.

The HPD hearing officer promised counsel to render a decision not later than September 14, 1984. When no decision had been rendered as of that date, FBK's counsel telephoned Mr. Sosinsky to inquire as to when a decision could be expected. At that time counsel was informed that, two weeks before, the proposed decision was submitted to Yasmin Duncan, Esq., the attorney who had prosecuted the case on behalf of HPD, and that, *under instruction from the Deputy Commissioner of HPD, Mr. Sosinsky was directed to submit his decision to HPD Deputy Commissioner Felstein for her review before its issuance.* Counsel's complaint, noting that any semblance of impartiality by

the respondent in this process had thus been entirely vitiated, went unanswered by the respondent.

Adopting proposed findings of fact and conclusions of law submitted by Ms. Duncan, Mr. Sosinsky determined that FBK's acts and intentions were irrelevant and that any act which might be construed as "harassment" of tenants by any prior owner would justify the effect of Zoning Resolution Section 96-109, *i.e.*, precluding the issuance of any Alteration Permit with respect to the Premises forever. (p. 3a, *et seq.*)

Mr. Sosinsky inferred from the fact that many tenants vacated their apartments during the ten years of prior ownership, and with no other evidence, that such proved the owner's intent to empty the building of residential tenants.

Despite the evidence that police were ineffective in such matters, and despite testimony that front door locks were continually being broken and replaced, and despite the evidence showing that FBK had obtained the removal of some of the squatters, and solely on the basis of FBK's inability to secure the main entrance on a continuous basis and to keep the building entirely free from squatters and other breakers-in, Mr. Sosinsky inferred that FBK was "deliberately" attempting to force the remaining tenants to vacate. (*Id.*)

Mr. Sosinsky also made reference in his determination to alleged instances of lack of provision of heat and insufficient cold water and lack of garbage collection at unspecified times since the time FBK had owned the Premises, without noting that these allegations were not even mentioned in the testimony by the sole tenant called to testify. Mr. Sosinsky claimed as dispositive the alleged fact, also not set forth in the testimony, that it would be in FBK's pecuniary interest to have the remaining tenants vacate their apartments.

Mr. Sosinsky concluded that HPD had proved by preponderance of the evidence that:

> a) The eviction and relocation practices of the owner did not satisfy all applicable legal requirements; and
>
> b) that harassment of tenants had occurred in the past and continues to occur at the subject premises.

Based on Mr. Sosinsky's findings, on October 12, 1984, the respondent denied FBK's application for a Certificate of No Harassment.

FBK thereupon initiated a proceeding under C.P.L.R. Article 78 in the nature of *certiorari* and *mandamus* to annul the HPD determination. Before Special Term of New York State Supreme Court, New York County, FBK argued, *inter alia,* that, Zoning Resolution Section 96-109 is unconstitutional for the following reasons: (1) the statute precludes the issuance of any Alteration Permit as to any building in the Special Clinton District where there is found "harassment" or "unlawful eviction and relocation practices," by any owner at any time in the past, which terms are undefined, regardless of the fact the present owner or applicant may have had no connection with, or real or even constructive notice of, such "harassment," or "unlawful eviction and relocation practices" (2) the statute effectively precludes any development or sale of such property forever, and thus effects a taking of property without compensation or a deprivation of property without due process of law, in violation of the Constitution of the State of New York and the Fifth and Fourteenth Amendments to the Constitution of the United States. Petitioner demanded that judgment be entered by Special Term in favor of FBK and against the respondent, declaring that Section 96-109 of the Zoning Resolution of the City of New York is unconstitutional on its face.

Special Term transferred the matter to the Appellate Division, First Department, of the New York State Supreme Court without reaching the merits. The Appellate Division confirmed the respondent's determination without opinion (p. 66a). An appeal to the New York State Court of Appeals, taken on the constitutional issue was dismissed without costs, *sua sponte* (p. 70a). A motion for leave to appeal was denied by the Appellate Division (p. 82a), and a renewed motion was denied by the Court of Appeals itself (p. 92a).

REASON FOR GRANTING THE WRIT

Zoning Resolution Section 96-109 is Unconstitutional on its Face as Effecting a Taking of Property Without Compensation or a Deprivation of Property Without Due Process of Law.

For purposes of this Petition we will assume, for purposes of argument, the factual correctness of HPD's finding that FBK had "harassed" tenants and committed unlawful eviction and relocation practices, though the record shows the contrary and though the administrative procedure which led to that finding is constitutionally tainted as well.*

---

* In the New York courts FBK argued that the expression "kangaroo court" was not altogether inapplicable to the administrative proceedings in issue. We recognize this Court's pronouncement in *Withrow v. Larkin*, 421 U.S. 35, 47-48 (1975) that there is a presumption of non-bias and no *per se* denial of procedural due process in combining prosecutorial and judicial functions in one agency. Nonetheless that presumption may be rebutted, *Schweiker v. McClure*, 456 U.S. 188, 195-196 (1982).

The record in this matter shows, essentially, that the Hearing Officer submitted his determination to the HPD prosecutor for approval before issuing it. There can be no greater showing of actual bias. *See Hastings v. Judicial Conference of United States*, 770 F.2d 1093, 1100 (D.C. Cir. 1985). At the very least, the procedure vitiated the appearance of fairness. *Utica Packing Co. v. Block*, 781 F.2d 71, 77 (6th Cir. 1986). *See also* Stewart, J., dissenting, in *Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482, 497 (1976).

A. Threshold issues

1. Standing to Challenge Vicarious Liability For Acts of Prior Owners (The Finding That Petitioner Had Itself "Harassed" Tenants)

There are two threshold issues in this Petition. The first is one of standing, in anticipation of the Respondent's argument challenging FBK's standing to raise the issue of vicarious liability.

In the various applications for review by the New York Court of Appeals, and presumably in this Court as well, the respondent will argue that the "harassment" finding against FBK vitiates review by this Court of Section 96-109, insofar as we are concerned with an owner's vicarious liability for acts of unrelated predecessors in title. Respondent will argue that, since the Petitioner itself "harassed" tenants (whatever *that* means), then that issue is irrelevant and the Petitioner lacks standing to raise it.

On the contrary, if, under a statute, a present property owner must suffer a perpetual inability to improve his property, based on alleged acts of predecessors in title in whose acts he did not participate, and of whose acts he has neither real nor constructive knowledge at the time he has acquired the property, the statute is facially unconstitutional. If the statute is facially unconstitutional, then it is void *ab initio* and creates neither rights nor disabilities in the first instance, and is to be treated as if it never existed. *Merton v. Abbott Laboratories,* 595 F.Supp. 834 (D.N.H. 1984); *Gary v. Spires,* 473 F.Supp. 878 (D.S.C. 1979).

These circumstances are analogizable to the rule permitting federal *habeas corpus,* despite an intervening guilty plea. Citing this Court's opinion in *Blackledge v. Perry,* 417 U.S. 21, 30 (1974), as explained in *Menna v. New York,* 423 U.S. 61, 62 (1975), the U.S. Court of Appeals for the Ninth Circuit held, in *Journigan v. Duffy,* 552 F.2d 283 (9 Cir. 1977):

> Even if the guilty plea establishes as a factual matter that [the petitioner] did the acts charged, a successful constitutional attack on the statute violated by those acts would undermine the foundation of the criminal prosecution, making those acts noncriminal. The statute, if unconstitutional, would be void and the conviction a nullity *ab initio*. As the Court explained in *Ex parte Siebold*, 110 U.S. 371, 376-77 [1879]:
>
> [The constitutionality of the statute] affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.

For purposes of this case, if Section 96-109 is void as providing for vicarious liability for acts of prior owners, then it is as if Section 96-109 was never enacted: Petitioner would be entitled to an Alteration Permit on the same basis as any other applicant, even assuming that the FBK committed acts of "harassment," since such would not have required a Certificate of No Harassment in the first instance.

In any event, the issues having to do with the prohibition against improvements in perpetuity are not affected by an assumption, *ad arguendo*, of the within FBK's personal culpability for "harassment."

2. Facial Unconstitutionality *versus* Unconstitutional Application

In the New York State courts we argued, in the alternative, that Section 96-109 was unconstitutional as applied by HPD. Since, in the text of the statute, the word "owner" does not necessarily refer to any and all prior owners for "harassment" purposes, we argued that HPD's administrative interpretation of the statute, as necessarily making such reference, was unconstitutional.

Given the present procedural posture of the matter, however, and particularly in the absence of any other extrinsic aids to interpretation, we must assume the validity of HPD's interpretation, and that the legislative body which enacted the provision intended it to apply to acts of unrelated prior owners. HPD is, after all, the agency charged with administration of the statute. *Blum v. Bacon,* 457 U.S. 132 (1982); *FEC v. Democratic Senatorial Campaign Committee,* 454 U.S. 27 (1981). HPD having duly interpreted Section 96-109 such that "owner" refers to any and all owners in the chain of title, we are put in the position of arguing that the statute is facially unconstitutional.

B. No Reasonable Relationship to Valid Governmental Purpose

When a zoning statute is challenged, on non-procedural grounds, as violative of the Due Process clause, the question is whether there is a reasonable connection between it and promotion of health, comfort, safety and the welfare of society. *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

At paragraph 91 of its Answer in state court (p. 61a), the respondent has asserted:

> Section 96-109 of the Zoning Resolution, pursuant to which Respondent denied Petitioner's application for a certification of no harassment, thereby barring substantial alteration of the subject premises, constitutes a reasonable and valid exercise of the power of the City, for the general health and welfare, to control the use and development of property, and did not effect a taking of Petitioner's property without due process of law. It is beyond question that a municipality may impose restrictions on the use and development

> of property for promotion of the general health and welfare of its populace.

On the contrary, we submit that making an owner responsible for alleged acts of predecessors in title will not further the ostensible aims of the legislation. Taken to its logical conclusion, Section 96-109 is irrational, arbitrary and that it not reasonably related and applied to some actual or manifest evil.

As noted below, the permanent nature of the prohibition imposed by Section 96-109 is unconstitutional in the first instance. That the prohibition applies even where the present owner/applicant has committed no acts which resemble harassment, renders it unconstitutional *a fortiori*. How can Section 96-109 be said to have any "rational basis," if its draconian effects are laid upon those who had nothing to do with what the section is supposed to prevent? We submit that no such "rational basis" exists.

In *Matter of Belle Harbor Realty Corp. v. Kern*, 35 N.Y.2d 507, 364 N.Y.S.2d 698, 323 N.E.2d 697 (1974), the New York Court of appeals established a three-pronged test of determining the "necessity," in constitutional terms, of land use regulation, which is in accord with this Court's holdings in *Ambler Realty* and its progeny:

> To justify an interference with the beneficial enjoyment of property the municipality must establish that it has acted in response to a dire necessity, *that its action is reasonably calculated to alleviate or prevent the crisis condition*, and that it is presently taking steps to rectify the problem.

35 N.Y.2d at 512 (emphasis added). Since Section 96-109 is applicable to all applicants, regardless of whether or not they ever carried out or condoned the prohibited activities, the rational connection between the law, and the evil it ostensibly combats, is nonexistent: the alleged wrongdoer

has already sold the property and made his profit. The net result will necessarily be abandonment of the property.

Since renovation is contingent on the issuance of an Alteration Permit, Section 96-109 is itself what prevents such renovation, and what compels the tenants to live under the "harassing" conditions described at the hearing. Such is both unreasonable and unconstitutional.

C. Conclusive Presumptions

In the state courts Respondent answered the above argument by observing that, unless the section applies no matter who committed the alleged harassment, prior owners who have committed such acts can easily escape the consequences by simply conveying to nominal purchasers.

Such is pure sophistry. The Respondent's rationale is nothing more than a conclusive presumption of nominal conveyance, and an owner's connection to prior owners and collusion in their alleged acts. It is equivalent to similar conclusive presumptions in which Respondent indulged, *i.e.*, that failure or inability to provide any single service or to provide for quiet enjoyment in any minor particular, establishes an intent to cause tenants to vacate, or that such can be conclusively inferred from it being in petitioner's pecuniary interest to vacate the building (on which no facts were adduced below).

The Constitution permits no irrebuttable presumptions where, as here, such are not necessarily true in fact and where the government has reasonable alternative means of making the crucial determination. *Hurley v. Van Lare*, 380 F.Supp. 167 (S.D.N.Y. 1974), vacated on other grounds 421 U.S. 338 (1975). Irrebuttable presumptions are offensive to the Due Process clause because they effectively deny an individual the right to challenge the purported factual basis of a determination adversely affecting his life and property.

D. Indefinite Prohibition

The most egregious facet of Section 96-109 is the indefinite effect of a finding of past "harassment." The prohibition against issuance of an Alteration Permit runs with the land, precluding substantial improvement or renovation *forever.*

To be sure, certain statutory moratoria on certain types of uses or improvements have been upheld. For example, in *Schafer v. City of New Orleans,* 743 F.2d 1086 (5 Cir. 1984), an ordinance precluding fast-food restaurants for a period not more than eleven months was upheld, with the following *caveat:*

> [The statute] merely suspends the owners' ability to devote their property to a particular use for 10 1/2 months. *We express no opinion on the reasonableness of zoning the property more restrictively than is presently permitted.* The City has taken no such action.

(Emphasis added.) In *Smoke Rise, Inc. v. Washington Suburban San. Comm'n.,* 400 F.Supp. 1369 (D.Md. 1975) a five-year moratorium on sewer hook-ups was upheld as not violative of Due Process, as preventing excess discharge while there was no ability to conduct a proper treatment. The court observed:

> [W]hile local governments may properly impose a moratorium on development for police power purposes, *such a moratorium must be reasonably limited as to time.*

400 F.Supp. at 1385-1386 (emphasis added).*

* Ironically, the court in *Smoke Rise* contrasted the factual situation in that case with that set forth in *Belle Harbor Realty Corp. v. Kerr,* 43 A.D.2d 727, 728, 350 N.Y.S.2d 698, 701 (1973), where a similar moratorium had been voided as violative of Due Process since it was essentially indefinite.

A similar observation was made in *Steel Hill Development, Inc. v. Town of Sanbornton,* 469 F.2d 956 (1st Cir. 1972), where an interim zoning measure, restricting lot size to a six acre minimum, was upheld as an "interim stop-gap measure:"

> *Were we to adjudicate this as a restriction for all time,* and were the evidence of pressure from land-deprived and land-seeking outsiders more real, *we might well come to a different conclusion.*

469 F.2d at 962 (emphasis added). The First Circuit later had an opportunity to deal with the other side of the coin in *Urbanizadora Versalles, Inc. v. Rivera Rios,* 701 F.2d 993 (1st Cir. 1983), where a "freezing" of a property owner's land for 14 years by reserving the land for future public improvements or condemnation (by placing a proposed highway on the site on the official land map), but without actually condemning the land, was held to be an unconstitutional deprivation of property.

In particular, the First Circuit noted in *Rivera Rios* that, because of the administrative location of the highway on the official map, the property had been "rendered useless for development or sale." 701 F.2d at 996. The same is true here. Because of the finding of "harassment," FBK can neither develop nor sell the subject property, since the disability to develop runs with the land forever.

In the state courts, the respondent sought to minimize the drastic effect of Section 96-109 by noting that not *all* improvements are precluded. The grossly deteriorated condition of the subject property (and of most of the property in the so-called "Clinton District") and the documented and uncontradicted episode involving the necessarily illegal installation of the new boiler (p. 6, *supra*) shows that such minimization is disingenuous.

We submit that the disability goes beyond simple deprivation. Whether one views "taking" as going to the degree to which one's use of property is restricted, *Pennsylvania Coal Co. v. McMahon,* 260 U.S. 393 (1922), or as attempting to secure a public benefit (as opposed to preventing a public harm) *Smoke Rise, Inc. v. Washington Suburban Sanitation Commission, supra,* we submit that the effect of Section 96-109 is nothing less than a taking of property without compensation.

Despite the Respondent's efforts, in the courts below,. to minimize its draconian effects, the simple fact is that, based on a finding of "harassment," an owner is precluded from improving property, even to the extent of curing the conditions which gave rise to the alleged "harassment" in the first instance. Since the property is thus rendered unsaleable and unimprovable, the result cannot be other than abandonment and acquisition of the property by the City. Thus a genuine "taking" without compensation is inevitable. Under the Fifth and Fourteenth Amendments to the Constitution, this result cannot be countenanced.

CONCLUSION

For the above-stated reasons, this petition for *certiorari* should be granted. For some arcane reason, the municipality has determined that the so-called Clinton District retain its "character," *i.e.*, it shall remain a foul and decaying slum in perpetuity, with property owners prohibited *by law* from curing the very conditions which the statute is *supposed* to remedy.

It is essential that this Court provide guidelines by determining the question, not adequately answered by the District Courts and the Circuit Courts of Appeals, as to the magnitude of the nature and duration of the disability to improve property which may constitute a taking of property without compensation or a deprivation of property without due process of law.

The zoning provision in question is an unwarrantable interference with property rights in a substantially large area of the nation's largest city. This Court should duly declare Section 96-109 unconstitutional and remand the matter to the state courts.

Respectfully submitted,

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January 7, 1987

86-1153

Supreme Court, U.S.
FILED
JAN 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1986

FBK REALTY CORP.,

Petitioner,

against

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

Appendix to Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

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Section 96-109 of the Zoning Resolution of the City of New York.

Alteration of buildings

Prior to the issuance of an alteration permit by the Department of Buildings for an alteration other than an incidental alteration for a *building* containing *residential uses* within the Preservation Area, the Administrator of Housing and Development shall certify to the Department of Buildings:

(a) That prior to evicting or otherwise terminating the occupancy of any tenant preparatory to alteration, the owner shall have notified the Administrator of Housing and Development of his intention to alter the *building*;

(b) That the eviction and relocation practices followed by the owner of the *building* satisfy all applicable legal requirements and that no harassment has occurred.

(Italics in original, as denoting terms defined elsewhere in Zoning Resolution.)

Fifth Amendment to the Constitution of the United States.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Finding of Fact and Decision.

IN THE MATTER

OF

The Application by JAMES HEFELFINGER on behalf of FBK Realty Corp. for a Certification pursuant to Section 96-109 of the Zoning Resolution.

Premises:

468 West 47th Street
Manhattan

A hearing was held on July 18, 1984 pursuant to section 96-109 of the Zoning Resolution on the issue of whether harassment of tenants at the premises 468 West 47th Street, Manhattan, has occurred. James Hefelfinger on behalf of FBK Realty Corp. was represented by Abrams, Lerner, Kisseloff & Lapidus, P.C., Lawrence A. Fox, Esq. of Counsel. The Department of Housing Preservation and Development of the City of New York (D.H.P.D.) was represented by Bruce Kramer, Esq., Yasmin Duncan of Counsel. During the hearing, John Mahar, an employee of Consolidated Edison, and Helen Tritschler, a tenant in occupancy testified on behalf of the City, and Ted Reeds, an Architectural Consultant, and James Hefelfinger, the President of FBK Realty Corp., testified on behalf of the Applicant.

ISSUE INVOLVED

The only issue to be decided at this hearing, was whether pursuant to 96-109(b) of the Zoning Resolution, "the eviction and relocation practices followed by the owner(s) of the building satisfy all applicable legal requirements and that no harassment has occurred".

STATUTORY CONSIDERATIONS

In the interpretation of the Zoning Resolution by this Administrative Tribunal, there are two phrases in the paragraph 96-109 which must be considered. 96-109 (b) talks of "eviction and relocation practices followed by the owner". This leads to the question of how an "owner" is to be defined. Secondly, the statute requires that the owner "satisfy all applicable legal requirements and that no harassment has occurred", with regard to the eviction and relocation practices. This phrase logically leads to the question as to how harassment is to be defined.

With regard to the terms "owner", the Zoning Resolution does not define or otherwise state who or what is considered to be an owner of property within the Special District as created. If the statute is narrowly construed, then Midmanhattan Realty Corp., Tenth Avenue Associates, Inc., and Nirco Investors Corp., the parties who owned the property at the time when many of the alleged acts of harassment occurred, would not be considered an owner since FBK Realty Corp. was the party in ownership who applied for a certification from D.H.P.D. However, such a narrow definition would do no justice to the statute since an owner who willfully harassed tenants of a given building would then only have to transfer title to some other nominal owner in order to avoid the statute. As such, FBK Realty Corp., the owner/applicant, must be

responsible for the actions of Midmanhattan Realty Corp., Tenth Avenue Associates, Inc., and Nirco Investors Corp., with regard to the evictions and relocation practices which these entities, as the former owners, followed in partially vacating the subject premises.

The term "harassment" is not defined within the framework of the Zoning Resolution. There is, however, a very strict definition of this term contained in Section D26-40.05 of the Housing Maintenance Code.

Under D26-40.05, many acts which might otherwise be considered equivocal can be legally determined to be acts of harassment: eg) lack of adequate security; failure to make repairs in a timely fashion; lack of adequate building maintenance; etc.

If the Department can demonstrate by a preponderance of the evidence that even one act of harassment occurred, this administrative body would be required to affirm the Department's action in failing to certify that the eviction and relocation practices satisfied all applicable legal requirements.

FINDING OF FACTS—BUILDING OWNERSHIP/AGENTS

1. The fee owner of 468 West 47 Street, Manhattan (premises from November 14, 1963 to February 23, 1982 was Midmanhattan Realty Corp.

2. The fee owner of the premises from February 23, 1982 to June 10, 1983 was Tenth Avenue Associates, Inc.

3. Anthony M. Kissling was the managing agent and a principal of Tenth Avenue Associates, Inc.

4. The fee owner of the premises from June 10, 1983 to October 4, 1983 was Nirco Investors Corp.

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5. The fee owner of the premises from October 4, 1983 to date is FBK Realty Corp.

TESTIMONY

At the hearing, the Department presented two witnesses. John Mahar, an employee of Consolidated Edison, testified as to the status of the utility account for the lights in the public hallways. Helen Tritschler, a tenant in the building for the past fifty years, testified as to current and past building conditions.

The applicant presented two witnesses, Ted Reeds, an architectural consultant, testified as to the physical condition of the building and discussed the applicants' plans for its renovation. James Hefelfinger, the president of FBK Realty Corp., testified as to how he expected the renovation would be conducted, given the status of the two remaining tenants in occupancy.

DECISION

There are clearly several important issues with regard to the overall Zoning Resolution which this Administrative Tribunal cannot rule upon. They include how far back in time the inquiry can be made with regard to the issue of harassment, and how the apparent inconsistency in the statute, vis a vis sections 96.00 and 96.109, affects the current application.

The only issue to be decided is whether the Department has proved by preponderance of the evidence that harassment of tenants occurred at the subject premises with regard to the eviction and relocation practices followed by the current or former owners.

It is obvious from the uncontradicted testimony of Ms. Tritschler that harassment attributable to the prior owners

occurred during the period, 1976-1983. Ms. Tritschler complained of a declining level of building services, the lack of adequate building security and other instances of neglect. It is therefore reasonable to conclude that harassment of tenants was one of the primary reasons why eight of the ten apartments in the buildings became vacant during this period of time. The abandonment of a building by an owner which results in this type of situation must be considered an unlawful "eviction and relocation practice" as defined by the Zoning Resolution.

Testimony by the applicant as to improvements made to the building since October of 1983 is some indication of good faith on their part, however the testimony as to the regular presence of squatters and the overall lack of building security is in direct contrast to the applicants' expressed intent to not force out the two current tenants. As a result of the applicant's inability or unwillingness to secure the front door and provide adequate security, it is apparent that they were hopeful that the last two residential tenants would find no other alternative but to vacate their apartments. One must take notice that it would definitely be in the applicant's pecuniary interest to have these last two apartments vacant.

The unwillingness or inability of the current owners to deal with the squatters, transients, derelicts and other undesirables who enter and remain in the building at will is a sure indication that this harassment continues. It is certain that the conditions in the building as they currently exist interfere with or disturb the comfort, repose, peace and quiet of the present occupants. As to the issue of janitorial services, applicant's documentary evidence as to how much they paid someone to act as the building superintendent is insufficient to rebut Ms. Tritschler's testimony as to the lack of these services.

It is also obvious from the records of the Department that the level of building services provided by the current owners continues to be unlawful. Between April 19, 1984 and June 5, 1984, the Department received complaints from the two remaining tenants about the lack of hot water, the accumulation of garbage in the public hallways, the low cold water pressure, the lack of janitorial services and the absence of locks on the main door to the building. Essential services are not now being regularly provided by the applicant. Such behavior is unlawful and despite the fact that the applicant contends that Ms. Tritschler is not being forced to move, this tribunal considers these action to be in the nature of unlawful eviction and relocation practices as specifically cited in the Zoning Resolution.

CONCLUSION

1. The Department has proved by a preponderance of the evidence that:

a) the eviction and relocation practices of the owner did not satisfy all applicable legal requirements; and

b) that harassment of tenants has occurred in the past and continues to occur at the subject premises.

2. The Department is therefore upheld in its decision to deny the applicants application for a certification pursuant to 96-109 of the Zoning Resolution.

Dated: September 24, 1984

JOEL I. SOSINSKY
Hearing Officer

Notice of Petition.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

IN THE MATTER

OF

FBK REALTY CORP.,

Petitioner,

against

ANTHONY GLIEDMAN, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

For Judgment Under C.P.L.R. Article 78 and C.P.L.R. Section 3001.

Index No. 312/85

Upon the annexed petition of FBK Realty Corp., verified the 6th day of February, 1985, and the exhibits annexed thereto, a motion will be made to this Court, at a Special Term, Part I, at the Courthouse, 60 Centre Street,

New York, New York on the 28th day of February, 1985 at 9:30 o'clock in the forenoon of that day or soon thereafter as counsel can be heard, for a judgment entered in favor of the petitioner and against the respondent, declaring that Section 96-109 of the Zoning Resolution of the City of New York is unconstitutional on its face and as applied to petitioner by respondent, and declaring that respondent's determination of October 12, 1984, denying petitioner's application for Certification of No Harassment was unconstitutional, unlawful, arbitrary, capricious and not based on substantial evidence, and annulling such determination, and either declaring that a Certificate of No Harassment pursuant to said Section 96-109 is not required as a prerequisite for issuance of an alteration permit by the Department of Buildings of the City of New York for buildings located in the Special Clintion District in general and for premises 468 West 47th Street, New York, New York in particular, or directing that such Certificate be issued to petitioner by respondent and that such issuance be deemed effected as a matter of law, and for such other and further relief as to this Court may seem just and proper, together with the costs and disbursements of this proceeding.

Please take notice that a verified answer and supporting affidavits, if any, must be served at least five days before the return date of this application.

Please take further notice that, pursuant to C.P.L.R. Section 7804(e) you are required to file with the Clerk of the Court, at least five days before the return hereto of the motion, the official file containing the records pertaining to the petitioner's application, which is the subject of this proceeding, held by the respondent as being in the official records kept by the respondent herein.

New York County is designated as the venue of this proceeding pursuant to C.P.L.R. Sections 506(b) and 507, on

the basis of respondent having there made the determination which is the subject of the petition and on the basis of the situs of real property which is the subject of the petition.

Dated: New York, New York
February 6, 1985

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To:

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Department of Housing Preservation
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125 Church Street
New York, New York 10007

Petition.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

IN THE MATTER

OF

FBK REALTY CORP.,

Petitioner,

against

ANTHONY GLIEDMAN, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent,

For Judgment Under C.P.L.R. Article 78 and C.P.L.R. Section 3001.

Index No. 312/85

Petitioner, by its attorneys Abrams Lerner Kisseloff Kissin & Lapidus, P.C., complaining of the respondent, alleges as follows:

1. Petitioner FBK Realty Corp. ("owner"), a domestic corporation, contracted, on or about August 30, 1983, to purchase the land and building known as and located at 468 West 47th Street, New York, New York (the "premises"). The seller of the premises was Nirco Investors Corp. The owner had and has no business or other connection whatsoever with any prior owner of the premises, including, without limitation, Nirco Investors Corp., except that of purchaser to seller.

2. A title search showed that the premises had been free of harassment and of harassment complaints. The owner obtained the premises through a real estate broker, Bach Realty. Title closed on October 4, 1983, for an adjusted sales price of approximately $310,000.00. Bach Realty was paid a commission of $14,000.00.

3. In view of the location of the premises in the "Special Clinton District," as defined in Section 96-00, et seq. of the Zoning Resolution of the City of New York, the owner applied to the Department of Housing Preservation & Development of the City of New York ("HPD"), of which the respondent Anthony Gliedman is the Commissioner, pursuant to Section 96-109 of the Zoning Resolution, for a Certificate of No Harassment.

4. Zoning Resolution Section 96-109 was enacted about ten years ago, to mitigate the problem of harassment and unlawful evictions of residential tenants in "Clinton," an area formerly known as "Hell's Kitchen." That section provides:

Alterations of Buildings

Prior to the issuance of an alteration permit by the Department of Buildings for an alteration other than an incidental alteration for a building containing residential uses within the Preservation Area, the Administrator of Housing and Development shall certify to the Department of Buildings.

* * *

a) That prior to evicting or otherwise terminating the occupancy of any tenant preparatory to alteration, the owner shall have notified the Administrator of Housing and Development of his intention to alter the building.

* * *

b) That the eviction and relocation practices followed by the owner of the building satisfy all applicable legal requirements and that no harassment has occurred.

By its terms the Section does not apply to any property owner who has made no efforts to evict or relocate tenants or who carried out any acts of harassment of tenants so as to encourage tenants to vacate, such as the within petitioner.

5. Only in 1984, the Commissioner of the Department of Housing Preservation & Development ("HPD") began interpreting the Section such that an owner of property located in the Special Clinton District must prove that no "harassment" has taken place at the property at any time,

by himself or by anyone else. HPD's position is that it makes no difference that the owner himself had nothing to do with any acts of alleged harassment, or that he is unconnected with any prior alleged acts of "harassment" of any prior owner, or that he has no real or even constructive notice of such prior acts, if any. Indeed, his stated and unequivocal intention to improve the property for the benefit of present and prospective residential tenants, and his efforts and expenditures in that regard, are deemed equally irrelevant. HPD's interpretation is thus logically inconsistent, since it disregards the fact that the prior owner, who sold the property years before, is not penalized; such would eliminate any claim that the statute is used to limit harassment.

6. Under Section 96-109, as thus interpreted, if "harassment" has taken place at the property, at any time, by anyone, regardless of the lack of connection to the present owner, a Certificate of No Harassment must be refused. Without such certificate the owner can never receive an alteration permit with respect to the premises. He must own the property with no legal ability to improve it, or even to upgrade essential systems for the benefit of the residential tenants. This situation persists, as a matter of law, forever, because the zoning amendment thus requires that no improvement can be made in perpetuity; as a practical matter, the property thus has no resale value.

7. In May, 1984, notwithstanding the fact that the within petitioner had never evicted or relocated tenants, and notwithstanding petitioner's guarantee that tenants have the unqualified right to remain as rent-controlled tenants for as long as they wished, respondent issued a determination of "reasonable cause" to believe that harassment had occurred at the premises. A hearing was

scheduled, therefore, to resolve the listed allegations of harassment as set forth in a "Notice of Hearing" dated July 5, 1984 (Exhibit "A").

8. The alleged acts of harassment set forth in the "Notice of Hearing" of July 5, 1984 are as follows:

(a) In 1976 there was a fire in the apartment of Helene Tritschler ["Tritschler"], the damage occurring from which was not repaired for six weeks;

(b) In 1983, a Mr. Nir attempted to pressure Tritschler verbally into vacating her apartment;

(c) In 1980 there was no lock on the entrance door to the premises;

(d) In 1980 the hallways of the premises were not lit;

(e) In 1981 a representative of the landlord offered a tenant, a Ms. Kochan, an amount of money between $2,000.00 and $3,000.00, and an efficiency apartment, to vacate her present apartment, which offer was refused;

(f) In 1980 the provision of heat and hot water were sporadic;

(g) In January 1982 essential services were not provided to premises;

(h) On January 18, 1983, Consolidated Edison turned off the gas hot water heaters and in June of 1983, Consolidated Edison turned off electricity to

the common areas of the premises, which was alleged never to have been reinstated;

(i) During the Winter of 1983-1984 no hot water or heat were provided for two months;

(j) Janitorial services were not provided and the hallways have not been cleaned from 1981 to date; and

(k) From 1976 until June of 1984 no routine repairs have been made to the premises. (*Id.*)

8. On July 18, 1984, a hearing was held before the office of Administrative Trials and Hearings of the City of New York, Joel I. Sosinsky, HPD's Administrative Law Judge, presiding. HPD produced only one witness concerning acts of alleged harassment. The witness was Helene Tritschler, whose testimony showed, at best, that certain owners of the premises, with whom the petitioner had had absolutely no connection, had failed or had been unable to provide certain services and, basically that over the last 15 years, that the premises had deteriorated along with the entire surrounding neighborhood.

9. The charges contained in the notice of hearing were wholly unproved or not material:

a) The fact that there was a fire in 1976 which was not repaired for weeks has, in and of itself, no probative value on the issue of intent by the owner at that time to harass the tenant.

b) The allegation that, an Eliahu Nir, of Nirco Investors Corp., petitioner's predecessor in title, had tried to

pressure Tritschler verbally into vacating her dwelling unit was not proven. There was no testimony in the record concerning such allegation.

c) The allegation that, in 1980, there was no lock on the entrance door is contrary to the only testimony on this point, inasmuch as Tritschler testified that there was a lock on the door in 1980.

d) The allegation that, in 1980, the hallways throughout were not lit, is not supported by any evidence in the record.

e) The allegation that, in 1980, the provision of heat and hot water was sporadic is not supported by any testimony in the record.

f) The alleged conversations with Estelle Kochan are irrelevant. Kochan did not testify and the record contains no evidence on this point.

g) The allegation that, in January of 1982, heat and hot water were not provided is not supported by any testimony in the record.

h) The allegation that, on January 18, 1983, Con Edison turned off the gas hot water heaters and, in June 1983, Con Edison turned off the electricity to the common areas, and that, to date the owner has not requested that service be reinstated and there is no Con Edison account maintained by the landlord, was not proved. Indeed, Tritschler testified that electricity was provided to the apartment and to the common areas.

i) The allegation that, during the winter of 1983-1984, no hot water and heat were provided for two months is not supported by any proof in the record.

j) The allegation that janitorial services have not been provided, and that hallways have not been cleaned from 1981 to date, was contradicted by the testimony of Mr. James Hefelfinger, the petitioner's President as well as proof of payments to the superintendent, who performed such service.

k) There was no proof in the record to support the allegation that, since 1976 until June of 1984 routine repairs have not been made, other than the HPD's contention that the building is in a deteriorated state.

10. Ms. Tritschler, HPD's sole witness on the issue of harassment, described how the building had allegedly been permitted to deteriorate during the period beginning in 1976, when the building was substantially damaged by a fire. At that time the firefighters broke into Ms. Tritschler's apartment, removed her window, chopped up her door and removed the skylight from the hallway. Those conditions were repaired in some four to six weeks. The roof was repaired later. Every described failure to provide building service or maintenance, set forth in Tritschler's testimony, refers to the period between 1976 and 1983, prior to the purchase of the Building by the petitioner.

11. Mr. Eliahu Nir, doing business as Nirco Investors Corp. purchased the Building in July 1983. Ms. Tritschler testified that, although addicts and other squatters still sometimes broke into the Building and loitered there, Mr. Nir was successful in getting some of the squatters out, in-

cluding a group who had broken down Ms. Tritschler's wall to get water. Shortly after Nirco took title, in August 1983, new doors and locks were installed on apartments as were a series of locks for the front door of the Building, which unfortunately proved unresistant to intruders, due to the fact that the premises are across the street from a park inhabited from drug addicts. New windows were installed as well. Mr. Nir also cleaned the basement.

12. In October 1983 the premises were purchased from Nirco by FBK Realty Corp. ("FBK"), the within petitioner. Ms. Tritschler contrasted favorably the conditions in the premises subsequent to FBK's ownership with those preceding. The new owners put a new lock on the vestibule making it necessary to have a key to gain access to the Building. Ms. Tritschler stated (1) that the new owner had begun replastering her apartment; (2) that she had received a new refrigerator; (3) that she had received a new toilet and a completely new bathroom; (4) that the owner had patched the roof; and (5) that hallway lightbulbs had been replaced with working fluorescent lights. Tritschler denied that any of petitioner's principals had made any statements or done any acts to encourage her to vacate her apartment.

13. Ted Reed, Jr., an architectural consultant who testified on petitioner's behalf, testified that the Building, located in a physically run-down area, surrounded by buildings requiring alteration and updating, was built around the turn of the century and that the present DC electrical system had to be replaced, along with the heating system and boiler and the plumbing, which was described as being beyond repair.

14. Mr. Reed identified petitioner's building plans and testified that the plans proposed new partitions, plumbing, heating and electrical systems and new double-pane windows. Such renovation was intended to work "around" the two occupied apartments, so that the present tenants would not have to vacate.

15. Mr. Reed described the repair of the heating system as resulting in a monumental "Catch 22." The new boiler which had to be installed was necessarily installed illegally, since no permit could be issued until the "harassment" question was disposed of; and since the lack of an adequate boiler constitutes "harassment" in the view of HPD, the owner could never cure the situation legally, rendering the entire solution circular. In fact, the boiler was duly installed and the building was cited with a violation for illegal installation, i.e., without permit.

16. Mr. Reed described the electrical wiring as looking as if it had been "chewed on," and the plumbing as rusted. The plumbing joints had been put together with old solder and could not resoldered without decomposing the pipes. In other words, both systems were irreparable. Mr. Reed went on to say that, if no permit could be issued with respect to re-vamping the electrical and plumbing systems, and the building continued to deteriorate and increase in dangerousness, the same "Catch 22" would necessarily apply to any efforts to renovate such systems.

17. Mr. James Hefelfinger, FBK's president, testified that, prior to closing, but at FBK's sole cost and expense, a new boiler had been installed in September 1983 at a cost of between $12,000.00 and $15,000.00. At that time moreover, the boiler room had been enclosed and windows had been replaced in Apts. 5N and 4N, the two occupied apartments.

18. Immediately upon closing, FBK had changed the front door lock cylinder and gave new keys to the tenants. A new electrical hot water system was installed. With respect to Apt. 5N, Ms. Tritschler's apartment, various emergent repairs were done quickly, including replacement of an old water-closet with a modern toilet, upgrading of the electrical circuitry, installation of a new 12-foot refrigerator and the installation of new apartment door locks and "saddle", repairs to the roof of the apartment, and repainting and replastering of the apartment. All of these acts were entirely inconsistent with an intention on the owners' part to harass the tenant into vacating the apartment. As to the lack of an exterior door lock, Mr. Hefelfinger explained that such was not required by law, which only required such lock on the vestibule door. The latter had been repaired in the previous month and was working the morning of the hearing.

19. Mr. Hefelfinger adamantly described the allegation of lack of cleaning, as to which there was no evidence, as false. FBK had retained a superintendent, Mr. Nerick, who was paid $75.00 per month to tend to the boiler and check its water level, as well as to clean the halls once a week and replace light bulbs when necessary and that, during this period, the old fixtures were replaced with fluorescent fixtures, which were working perfectly. Copies of the superintendent's salary checks were received in evidence.

20. It was and is FBK's intention to rehabilitate the Building and renovate vacant apartments and common areas. Mr. Hefelfinger explained that this would take some time in view of the administrative roadblock contained in Zoning Resolution Section 96-109.

21. What made the roadblock particularly egregious was that neither FBK not any of its principals had ever committed or attempted any acts of harassment with respect to any of the tenants of the building, nor had they given any indication to anyone that they wanted the present tenants of the building to vacate. On behalf of FBK, Mr. Hefelfinger guaranteed the tenants the right to remain as rent-controlled tenants as long as they wished, and he did so on the record at the hearing:

> Q. Is it your intention to renovate the building and have these tenants remain in possession as rent-controlled tenants of apartments in the building? A. Yes, it is.
>
> Q. And would you give that guarantee here today— A. Certainly.
>
> Q. —that them [*sic*] remain as rent-controlled tenants without any change in their status? A. They are existing tenants, and they can stay there as long as they want.

(Transcript of Hearing, July 18, 1984, pp. 122-123)

22. Mr. Hefelfinger elaborated on FBK's proposed renovation in detail: (1) new electrical and plumbing risers to each apartment; (2) new meters, circuit breakers and circuit breaker panels; (3) complete rewiring and replumbing in vacant apartments; (4) new interior walls and partitions; (5) new fixtures, including kitchen sinks, bathrooms and vanities; (6) new floors, kitchen cabinets and kitchen appliances. Mr. Hefelfinger noted that the present residential tenants could get what would amount to brand new apartments. The choice would be theirs, and all they would have to do is allow FBK's workmen to work around them or, if they chose, relocate temporarily during the

renovation to their own apartments, to other apartments in the building, and move back when renovations would be completed.

23. One of the problems inherent in making any repairs to Ms. Tritschler's apartment was the difficulty in gaining entry, since Ms. Tritschler was often away and would not leave her keys with the owner.

24. Mr Hefelfinger observed that the immediate area consisted of of housing stock predating the turn of the century and a large population of vagrants and drug addicts. Neither the owner's principals nor employees had seen any intruders inside the Building or, indeed, anyone other than Ms. Tritschler. When the owners had been told of derelict problems, they have called the police and have urged the tenants to do the same. Following some on-site inspections, the owner had tinned up windows adjacent to fire escapes, and resecured units showing evidence of break-ins, and had done everything in their power to keep squatters out of the building.

25. The testimony thus showed that petitioner and petitioner's immediate predecessor in title, Nirco Investors Corp., made strenuous efforts to improve the premises for the tenants in occupancy. Nirco removed squatters, installed new doors, locks and windows, cleaned the basement and repaired the roof. Petitioner replaced the heating and hot water system, installed a new toilet and refrigerator, replaced inoperative hallway lights, replastered apartments and retained a superintendent to clean and maintain the premises. This had been recognized by Community Board No. 4 in a letter dated October 5, 1983. (Exhibit "B")

26. The record before the administrative hearing was entirely inconsistent with allegations of eviction and relocation practices, lawful or otherwise, and of "harassment."

27. Mr. Sosinsky promised counsel to render a decision not later than September 14, 1984. When no decision had been rendered as of that date, petitioner's counsel telephoned Mr. Sosinsky to inquire as to when a decision could be expected. At that time counsel was informed that, two weeks before, the proposed decision was submitted to Yasmin Duncan, Esq., the attorney who had prosecuted the case on behalf of HPD, and that under instruction from the Deputy Commissioner of HPD, Mr. Sosinsky was directed to submit his decision to Deputy Commissioner Felstein for her review before its issuance. Counsel's complaint, noting that any semblance of impartiality by the respondent in this process had thus been entirely vitiated, went unanswered by the respondent. (Exhibit "C")

28. Adopting proposed findings of fact and conclusions of law submitted by Ms. Duncan (Exhibit "D"), Mr. Sosinsky determined that petitioner's acts and intentions were irrelevant and that any act which might be construed as harassment of tenants by any prior owner would justify the effect of Zoning Resolution Section 96-109, i.e., precluding the issuance of any Alteration Permit with respect to the premises forever. (Exhibit "E")

29. Mr. Sosinsky inferred from the facts that many tenants vacated their apartments during the ten years of prior owners, and with no other evidence that such was effected with deliberate intent to vacate.

30. Despite the evidence that police were ineffective in such matters, and despite testimony that front door locks were continually being broken and replaced, and despite the evidence showing that petitioner had obtained the removal of some of the squatters, and solely on the basis of the petitioner's inability to secure the main entrance on a continuous basis and to keep the building entirely free from squatters and other breakers-in, Mr. Sosinsky inferred that petitioner was deliberately attempting to force the remaining tenants to vacate. The Notice of Hearing (Exhibit "A") had set forth no such allegation. Thus the determination was based on charges of which petitioner had no notice whatsoever.

31. Mr. Sosinsky also made reference in his determination to alleged instances of lack of provision of heat and insufficient cold water and lack of garbage collection at unspecified times since the time petitioner had owned the premises, without noting that these allegations were not ever mentioned in the testimony by Ms. Tritschler, the sole tenant called to testify. Mr. Sosinsky claimed as dispositive the alleged fact, also not set forth in the testimony, that it would be in petitioner's pecuniary interest to have the remaining tenants vacate their apartments.

32. Mr. Sosinsky concluded that HPD had proved by preponderance of the evidence that:

> a) The eviction and relocation practices of the owner did not satisfy all applicable legal requirements; and
>
> b) that harassment of tenants had occurred in the past and continues to occur at the subject premises.

Based on Mr. Sosinsky's findings, on October 12, 1984, the respondent denied petitioner's application for a Certificate of No Harassment (Exhibit "E").

33. Inasmuch as Zoning Resolution Section 96-109 precludes the issuance of any Alteration Permit as to any building in the Special Clinton District where there is found "harassment" or unlawful "eviction and relocation practices," by any owner at any time in the past, which terms are undefined, regardless of the fact that the present owner or applicant may have had no connection with, or real or constructive notice of, such "harassment," or unlawful "eviction and relocation practices," which effectively precludes any development or sale of such property forever, such section effects are taking of property without due process of law, in violation of Article 1, Section 6 of the Constitution of the State of New York and the Fourteenth Amendment to the Constitution of the United States and is, therefore, unconstitutional on its face.

34. Inasmuch as the respondent has belatedly interpreted the word "owner" in Zoning Resolution Section 96-109 as including any former owner of subject property, so as to effect a taking of property of a present owner without due process of law, premised on acts and practices with which the present owner has no connection, and of which the present owner had and has no notice, such interpretation constitutes an unconstitutional application of law and a denial of due process of law.

35. Inasmuch as HPD's the administrative law judge in this matter was required to obtain approval for his determination from the prosecuting party before rendering such decision formally, the conduct and determination of

the hearing before the Office of Administrative Trials and Hearings of the City of New York, which is the subject of this petition, effected a denial of procedural due process of law.

36. Inasmuch as HPD's evidence adduced before the Administrative Hearing failed to prove that petitioner had engaged in unlawful eviction and relocation practices, or that harassment of tenants was presently occurring at the subject premises, the respondents' determination of October 12, 1984 was not based on substantial evidence and should be annulled.

WHEREFORE, petitioner demands that judgment be entered in favor of petitioner and against the respondent, declaring that Section 96-109 of the Zoning Resolution of the City of New York is unconstitutional on its face and as applied, that the conduct and determination of the hearing before the Office Administrative Trials and Hearings of the City of New York denied petitioner due process of law and that the respondent's determination of October 12, 1984 was not based on substantial evidence, and granting certiorari, annulling such determination; and declaring either that a Certificate of No Harassment is not required for the issuance of Alteration Permits for the subject premises, or is deemed granted as a matter of law, as the case may be; and, if such Certificate is deemed required, granting mandamus, directing HPD to issue such a Certificate to petitioner; together with such other and further

relief as to the Court may seem just and proper, together with the costs and disbursements of this proceeding.

ABRAMS LERNER KISSELOFF
KISSIN & LAPIDUS, P.C.
Attorneys for Petitioner
1350 Avenue of the Americas
New York, New York 10019

(Verified by James Hefelfinger, February 6, 1985.)

Answer.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

IN THE MATTER

OF

FBK REALTY CORP.,

Petitioner,

against

ANTHONY GLIEDMAN, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

For Judgment Under C.P.L.R. Article 78 and C.P.L.R. Section 3001.

Index No. 312/85

Respondent, Anthony Gliedman, Commissioner of the Department of Housing Preservation and Development of the City of New York ("Commissioner"), by his attorney Frederick A. O. Schwarz, Jr., Corporation Counsel of the

City of New York, for his answer to the Petition of FBK Realty Corp., respectfully admits, denies and otherwise alleges, upon information and belief, as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "1" of the Petition.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "2" of the Petition, except denies so much of said paragraph as alleges, purports to allege or may allege that there has not been harassment of tenants at said premises within the meaning of Zoning Resolution §96-109.

3. Denies so much of the allegations contained in paragraph "4" of the Petition as pertains to the applicability of Zoning Resolution §96-109; denies further so much of said allegations as alleges, purports to allege or may allege that Petitioner's application for certification of no harassment was wrongfully denied; and respectfully refers the Court to Zoning Resolution §96-00 *et seq.* for a statement of the purposes and goals of the Special Clinton District regulations, including §96-109, and for the complete and precise text of §96-109 (copy submitted herewith as Respondent's Exhibit "2").

4. Denies each and every allegation contained in paragraph "5" of the Petition, except admits that Zoning Resolution §96-109 is construed to require the denial of certification of no harassment upon a finding that the eviction and relocation practices followed by the owner of a building situated within the Preservation Area of the Special Clinton District, including the predecessor in title

of a current owner, failed to satisy all applicable requirements and that harassment has occurred with respect to such premises; denies further so much of said paragraph as alleges that petitioner is precluded from improving the subject premises; and denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph pertaining to Petitioner's intention regarding the subject premises.

5. Denies each and every allegation contained in paragraph "6" of the Petition, except admits that an application for certification of no harassment will be denied upon a finding that the present owner of a premises situated in the Preservation Area of the Special Clinton District, or his predecessor in title, has followed eviction and relocation practices which fail to satisy all applicable requirements and that harassment has occurred at such premises.

6. Denies so much of the allegations contained in paragraph "7" of the Petition as alleges, purports to allege or may allege that the determination of Respondent that there existed reasonable cause to believe that harassment occurred at the premises 468 West 47th Street, was in any respect improper, and denies further so much of said allegations as is inconsistent with the record of the within administrative proceeding or the determination of Respondent challenged herein.

7. Denies each and every allegation contained in the first paragraph "8" found on the fourth page of the Petition, except admits that said paragraph does paraphrase some of the alleged acts of harassment contained in the said Notice of Hearing.

8. Denies each and every allegation contained in the second paragraph "8" found on the fifth page of the Petition, and denies further so much of said allegations as is inconsistent with the record of the within administrative proceeding, except admits that Joel I. Sosinsky presided as Hearing Officer and Helene Tritschler testified as a witness at the request of the Department of Housing Preservation and Development.

9. Denies each and every allegation contained in paragraph "9" of the Petition.

10. Denies so much of the allegations contained in paragraph "10" of the Petition as allege, purport to allege or may allege that the evidence of acts constitution harassment concerned only the period prior to the purchase of the subject premises by Petitioner.

11. Denies so much of the allegations contained in paragraph "11" of the Petition as is inconsistent with the record of the within administrative proceeding or the determination challenged herein.

12. Denies so much of the allegations contained in paragraph "12" of the Petition as alleges, purports to allege or may allege that acts which are deemed to constitute harassment did not continue after Petitioner acquired fee title to the subject premises, and denies further so much of said paragraph as is inconsistent with the record of the within administrative proceedings or the determination challenged herein.

13. Denies so much of the allegations contained in paragraphs "13", "14", "15", "16", "17", "18" and "19" of the Petition as is inconsistent with the record of

the within administrative proceedings or the determination challenged herein; denies so much of said paragraph as alleges, purports to allege or may allege that Zoning Resolution §96-109, on its face or as applied to the subject premises, effects an unconstitutional taking of property; and avers that each and every allegation contained in said paragraph is irrelevant to the determination of this proceeding.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "20" of the Petition; denies so much of said allegations as alleges or may allege that Petitioner is prevented from performing repairs or incidental alterations; and avers that said allegations are irrelevant to the determination of this proceeding.

15. Denies each and every allegation contained in paragraph "21" of the Petition; denies further so much of said paragraph as is inconsistent with the record of the within administrative proceeding or the determination challenged herein, except admits that said record contains the excerpt cited; and avers that each and every allegation contained in said paragraph is irrelevant to the determination of this proceeding.

16. Denies so much of the allegations contained in paragraph "22" of the Petition as is inconsistent with the record of the within administrative proceeding or the determination challenged herein, and avers that said allegations are irrelevant to the determination of this proceeding.

17. Denies so much of the allegations contained in paragraph "23" of the Petition as is inconsistent with the record of the within administrative proceeding.

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained on paragraph "24" of the Petition; denies further so much of said paragraph as is inconsistent with the record of the within administrative proceeding or the determination challenged herein; and avers that each and every allegation contained in said paragraph is irrelevant to the determination of this proceeding.

19. Denies so much of the allegations contained in paragraph "25" of the Petition as are inconsistent with the record of the within administrative proceeding or the determination at issue herein, and avers that Petitioner's Exhibit "B" is irrelevant to the determination of this proceeding.

20. Denies each and every allegation contained in paragraph "26" of the Petition.

21. Denies so much of the allegations contained in paragraph "27" of the Petition as alleges, may allege or purports to allege that the within administrative proceeding in any respect violated lawful procedure. Avers that the Hearing Officer rendered a proposed finding of fact and decision but, pursuant to Zoning Resolution §96-109, the actual determination is within the sole province of Respondent or his designee.

22. Denies so much of the allegations contained in paragraphs "28" and "29" of the Petition as is inconsistent with the record of the within administrative proceeding or the determination challenged herein.

23. Denies each and every allegation contained in paragraph "30" of the Petition.

24. Denies so much of the allegations contained in paragraph "31" of the Petition as is inconsistent with the record of the within administrative proceeding or the determination challenged herein.

25. In response to paragraph "32" of the Petition, avers that the denial of Petitioner's application for certification of no harassment was based upon the review of the record before the Hearing Officer by the Deputy Commissioner of the Office of Rent and Housing Maintenance, to whom Respondent has delegated his sole authority and jurisdiction to determine such applications.

26. Denies each and every allegation contained in paragraph "33" of the Petition.

27. Denies each and every allegation contained in paragraph "34" of the Petition, except admits that an application for certification of no harassment will be denied upon a finding that the present owner of a premises situated in the Preservation Area of the Special Clinton District, or his predecessor in title, has followed eviction and relocation practices which fail to satisfy all applicable requirements and that harassment has occurred at such premises.

28. Denies each and every allegation contained in paragraph "35" of the Petition.

29. Denies so much of the allegations contained in paragraph "36" of the Petition as is inconsistent with the record of the within administrative proceedings or the determination challenged herein, and denies further that the said determination was not based upon substantial evidence in the record as a whole.

AS AND FOR AN AFFIRMATIVE STATEMENT OF FACTS:

30. The premises which is the subject of this proceeding is 468 West 47th Street, Borough of Manhattan ("subject premises"). It is situated in the Special Clinton District, a special purpose district established by Article IX, Chapter 6 of the Zoning Resolution ("Zoning Resolution) (§96-00, *et seq.*), as is shown on Zoning Map No. 8c. (A copy of the New York Zoning Map No. 8c is submitted herewith as Exhibit "1".)

31. The boundaries of the Special Clinton District are, generally, Eighth to Twelfth Avenues and 41st to 59th Streets, in the Borough of Manhattan. The regulations applicable to the Special Clinton District are designed to preserve and strengthen the low-rise, residential character of the district. They are also intended to maintain the mixture of income groups which were found to reside in the Clinton area at the time of adoption of the Special Clinton District. (Zoning Resolution §96-00.) (A copy of the Special Clinton District regulations is submitted herewith as Exhibit "2"). The regulations of the Special Clinton District encourage the preservation of existing housing in the district (the "Preservation Area"), and direct new, highrise development to the peripheral areas of the district (the "Perimeter Area"). (See Exhibit "2" at §96-03, *et seq.*)

32. Section 96-109 of the Zoning Resolution, which is contained in the regulations of the Special Clinton District (Zoning Resolution Article IX, Chapter 6), provides as follows:

Alterations of buildings

Prior to the issuance of an alteration permit by the Department of Buildings for an alteration other than an incidental alteration for a *building* containing *residential uses* within the Preservation Area, the Administrator of Housing and Development[*] shall certify to the Department of Buildings:

(a) That prior to evicting or otherwise terminating the occupancy of any tenant preparatory to alteration, the owner shall have notified the Administrator of Housing and Development of his intention to alter the *building*;

(b) That the eviction and relocation practices followed by the owner of the *building* satisfy all applicable legal requirements and that no harassment has occurred. [Emphasis in original—denotes defined terms in Zoning Resolution §12-10.]

33. Section 96-109 of the Zoning Resolution thus conditions the issuance of alteration permits by the Department of Buildings, for buildings located within the "Preservation Area" of the Special Clinton District, upon certification by Respondent Commissioner that harassment was not used to displace established residents from these buildings. This provision is intended to remove the economic incentive to the harassment of residents of the Clinton neighborhood.

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*The Commissioner of Housing Preservation and Development is successor to the Administrator of Housing Development. (Local Law No. 29 of 1977.)

34. Pursuant to the power vested in the Commissioner by §§1801 and 1802 of the New York City Charter ("Charter"), he has delegated the duty to issue Clinton certifications to the Deputy Commissioner, Office of Rent and Housing Maintenance of the Department of Housing Preservation and Development ("Deputy Commissioner").

35. On or about September 20, 1983, an application was filed with the Department of Buildings, under Alt. Application No. 1373/1983, for approval of alteration work at the premises 668 West 47th Street, Borough of Manhattan. The application sought permission to renovate the entire building, including the creation of addi-tional apartments.

36. Objections to the proposed alterations were issued by an Examiner of the Department of Buildings on or about October 28, 1983. The fifth objection required that the applicant show compliance with §96-109 of the Zoning Resolution, *i.e.* that a certification of no harassment be obtained from Respondent.

37. An amendment to the specifications and plans filed under Alt. Application No. 1373/1983, revising and correcting use of the proposed first floor occupancy, dated December 12, 1983, thereafter was filed with the Department of Buildings.

38. A request for certification of no harassment was filed on or about December 15, 1983, with the Clinton Neighborhood Preservation Office, a constituent office of the Department of Housing Preservation and Development. (A copy of the request for certification of no harassment is submitted herewith as Respondent's Exhibit

"3".) The Clinton Neighborhood Preservation Office works to preserve and rehabilitate the housing stock in the Clinton area and, as part of its responsibilities, seeks to prevent displacement of tenants from buildings that are upgraded.

39. Pursuant to the standard procedure for review of requests for certification of no harassment, the Clinton Neighborhood Preservation Office conducted an investigation and, thereafter, referred the subject premises to the SRO Anti-Harassment Unit of the Division of Evaluation & Compliance of the Department of Housing Preservation and Development, Office of Rent and Housing Maintenance. Based upon the file referred by the Clinton Neighborhood Preservation Office, the SRO Anti-Harassment Unit recommended to the Commissioner that a finding issue of reasonable cause to believe that harassment occurred at the subject premises.

40. Thereafter, the Commissioner issued a determination that there was reasonable cause to believe that harassment occurred at the subject premises. (A copy of the determination is submitted herewith as Respondent's Exhibit "4".) A copy of the determination was mailed on or about May 25, 1984 to James Hefelfinger as applicant on behalf of Petitioner.

41. By Notice dated July 5, 1984, the Department of Housing Preservation and Development notified the applicant that a hearing would be held on July 18, 1984 regarding the request for certification pursuant to §96-109 of the Zoning Resolution. (A copy of the Notice of Hearing is submitted herewith as Respondent's Exhibit "5".) The said Notice stated further that the department alleged that "at various times, the fee owner of the premises through

its officers, agents, employees or other persons, engaged in conduct with respect to the lawful occupants of the premises, 468 West 47 Street, Manhattan, which constituted harassment." (Respondent's Exhibit 5.) The Notice of Hearing set forth specific conditions, acts and courses of conduct said to constitute alleged acts of harassment as follows (Respondent's Exhibit 5):

> 1. Helene Tritschler is the lawful occupant of apartment 5N at the premises. In 1976, there was a fire in her apartment and it was not repaired for six weeks. In 1983, the landlord, Mr. Nir, tried to verbally pressure Helene Tritschler into vacating her dwelling unit.
>
> 2. In 1980, there was no lock on the entrance door to the premises and undesirables were free to enter the building to disturb the lawful occupants, Tritschler and Kochan. In addition, several squatters have since taken up residencey at the premises.
>
> 3. In 1980, the hallways throughout were not lit.
>
> 4. In 1980, the provision of heat and hot water was sporadic.
>
> 5. Estelle Kochan is the occupant of Apartment 4N at the premises. In or about September of 1981, the managing agent, Anthony M. Kissling told Kochan that he wanted all tenants to vacate their dwelling units. Kochan was also offered $2,000-$3,000 and an efficiency apartment which she refused.

6. In January 1982, the essential services of heat, hot and cold water were not provided.

7. On January 18, 1983, Con Edison turned off the gas hot water heaters because of a leak in the pipes. In June of 1983, upon the owner's request Con Edison turned off the electricity to the common areas of the building. To date the owner has not requested that service be reinstated and there is no open Con Edison account maintained by the landlord. From July 6 to 22, 1983, there was a series of electric light outages affecting the occupied apartments at the premises.

8. In 1983, the provision of heat and hot water was generally sporadic however, during the winter of 1983-1984, no hot water and heat were provided for two months.

9. Janitorial services have not been provided; the hallways have not been cleaned from 1981 to date.

10. Since 1976 until June of 1984, routine repairs have not been made. During this period of time, the conditions which needed repairs included but were not limited to a leak in the roof, exposed electrical wiring, and the replacement of broken windows, thereby allowing conditions dangerous to life, health and safety to continue unabated for an extended period of time.

42. A hearing was conducted on July 18, 1984 by a Hearing Officer employed by the Department of Housing Preservation and Development. Petitioner was repre-

sented by legal counsel, as was the department. (A copy of the transcript of the hearing is submitted herewith as Respondent's Exhibit "6".*)

43. The first witness to testify, called by the Department of Housing Preservation and Development, was John Mahar. The witness said that he was employed by Consolidated Edison as a senior customer service representative handling Manhattan accounts (T21). The witness testified regarding the utility's billing records for the subject premises. He stated that there were three open accounts for the subject premises: a store account (GA Supermarket), a fourth floor apartment (Estelle S. Cotman), and a fifth floor apartment (H. N. Tritschler) (T22). He testified further that the accounts for the halls were "finaled"—*i.e.*, service was terminated—as of June 7, 1983, and that as far as he was aware the account for the hallway lights had not been reopened (T22). On cross-examination by Petitioner's attorney, the witness acknowledged that his testimony as to whether there currently was lighting in the common areas was based upon the utility's computer records and not the witnesses own personal inspection (T23). He acknowledged, in addition, that the utility has other service representatives who handle applications from new building owners regarding gas, electric and steam service from the utility, and that such activity should be reflected in the utility's computer records (T24-25). The witness testified that the computer records referred to by him showed no such activity (T25). The witness next testified that the records also did not show the issuance of permits for the performance of electrical work at the subject premises, and that such informa-

*Hereafter references to the hearing transcript will be indicated by the letter "T" followed by the appropriate page number or numbers.

tion regarding permit requests or the performance of work should be reflected (T25). Petitioner's attorney showed the witness a permit, which the latter identified as a permit to do electric work at the subject premises; the witness stated that it did not appear on his computer print-out (T26). The witness also testified, in response to a question from Petitioner's attorney, that the conversion from DC to AC current was deemed an upgrading of electrical service and that service would not be restored until the work is done (T27-28).

44. The next witness called by the department was Helen Tritschler. The witness stated that she has lived in apartment 5N of the subject premises for fifty years (T32). She testified that while she was away from the building there was a fire in the apartment below and, presumably in the course of fighting the fire, that her windows were removed, the skylight was broken and the door to her apartment was broken (T33). The witness stated that there were promises from an individual who was the building owner or agent (T33-34), that repairs would be done in her apartment (T35). The witness testified further that she was without windows or a door for about six weeks (T36), and that rain had come into her apartment through the broken skylight (T43).

45. In addition to giving testimony regarding needed repairs in her apartment, the witness also testified regarding conditions in the building. She stated that for a long period of time (she said that she did not recall precisely how many years) the lock on the building's entrance door remained broken (T45-46). As a result, she testified, drug addicts entered the building, sleeping in the hallway and making noise all night long (T46). She stated that she was scared—she could not sleep, never opened her door (T46).

The witness testified, in addition, that the letter boxes were broken (T46). The witness testified that drug addicts were still entering the subject premises and sleeping on mats on the floor in an empty first floor apartment (T47-48). The witness stated that she was disturbed by this situation and has informed a representative of the landlord as recent as the day before the hearing (T48-49), and that she had earlier conversations with the landlord's representatives regarding the presence of undesirables in the building (T49 and 52).

46. Regarding general building conditions, the witness also testified that the level of services, such as electricity, heat, hot water and janitorial services, were practically non-existent (T59). She stated, for example, that she had not had hot water for the five week period preceding the hearing (T59).* The witness stated that under the prior owner the tenants could not get heat, hot water or janitorial services (T60). The witness also testified regarding the frequent lack of lights in the hallways, that it was "pitch black," and that flourescent bulbs were put in by the present owner only two or three weeks prior to the hearing (T64-66). She also stated that the floor covering in the hallways, the doors and the letter boxes all needed repair (T66). The witness also testified that the vestibules are presently "a dirty, filthy mess with an old toilet and pipes in the area outside of her apartment (T66-67).

47. The witness testified that the prior owner was "trying to get people out of the house" (T60). She stated that this conclusion was based on the landlord having permitted a woman to occupy an apartment in the building with

*The witness said that she was Upstate with her sister for a period of time, and returned five weeks before the hearing and did not have hot water from the moment of her return (T59).

twelve dogs and an undetermined number of cats; the animals caused a stench that was "terrible" (T60). The tenants repeatedly complained, she testified (T60). She also stated that in a winter month in 1981,* an owner of the subject premises inquired whether she would be interested in another apartment but she terminated the conversation when she discovered that he was tape recording the conversation (T63). The witness also testified that a former tenant who occupied the apartment next to that of the witness was asked by the landlord to ask the witness to "get out of the house—because it's very dangerous" (T63). She stated that her neighbor said that the landlord wanted her out of the building (T63-64), and that there would eventually be a fire like "what happened on 48th Street with all the fires" (T64).

48. Testifying further regarding conditions in her apartment, the witness said that repairs were needed as well as a paint job—she received promises that the work would be performed but nothing has been done (T67-68), although the windows in her apartment were repaired as were the hallway lights and a new toilet was installed (T68). However, she testified that the work which was performed in her apartment was done in the week prior to the hearing (T69). She noted that work also had been done on the roof some weeks earlier, but when it rains it still comes into her apartment (T69). The witness noted that the skylight leaks when it rains, as a result of the damage caused when the fire had occurred in the apartment below, and that the water then comes into her apartment (T70).

49. The witness also testified regarding the circumstances under which the subject premises was vacated,

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*She stated that she remembered it was winter because it was cold and there was no heat (T63).

acknowledging that there presently were only two tenants, and stating that "nobody would live in the house the way it is now" (T72). She stated that the tenant who lived in the apartment beneath her was given money to move (T72). The tenant next to her was withholding his rent money at the suggestion of the "Housing Department," putting it in the bank and spending money doing repairs and cleaning the building—and eventually he left (T72-73). Another occupant, a woman who was made building superintendent, the individual with the many dogs and cats, was paid to get out by the landlord (T74). The witness stated that everybody "cleaned out" of the subject premises within the preceeding three or four years (T76). She stated that prior to the fire, and prior to the time when tenants began to vacate the premises, only one new tenant was brought in—a man from a peep show on 42nd Street (T76). The witness said that he told the tenants "Gee, I hope I have a little better luck in your apartment because the last two apartments had fires in them" (T76). The witness then testified (T77):

> And sure enough, we had a fire while I was out of town. It was in his apartment that the fire occurred.

50. The witness was next cross-examined by Petitioner's attorney. She testified that the area in which she lived had been deteriorating for some period of time (T78), and that while it was a nice area at one time it is presently dangerous (as a result of the presence of a park across from the subject premises) (T78-79). She stated that since August 1983 the only building improvements of which she was aware were the installation of new windows and doors, and lights in the hallway (T82). She also conceded that there had been work done in the basement, and

possibly a new heating system may have been installed (T83).* The witness also stated that her refrigerator was replaced and she was given a "new" bathroom (T83). The witness acknowledged that the subject premises needed to be upgraded, particularly since it had been permitted to run down for a number of years (T84-85). In response to counsel's question, the witness stated that the new owner had not tried to make her move from the subject premises (T86), but testified further that (T86):

> . . . the people that come to do repair work, I think thay are asking me questions that the owner is asking them to ask me.
>
> * * *
>
> They say, "Any chance of you moving out of here? If the owner gives you money, would you move out? If he gets you another apartment, would you move out? If he gets you something equal to this, would you move out; these kind of questions.

The witness said that this was a conversation which she had with a plumber (T86).

51. The cross-examination of the witness continued regarding the building's entrance door. She stated that there is presently a lock that does not work (T88). The witness stated that her neighbor had installed a secure lock on the door, a "Yale lock", but that the prior owner had removed it and replaced the lock with a "cheap one," which was constantly being broken (T88-89); that after the neighbor moved there had been no lock for a period of

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*This was suggested by Petitioner's counsel on cross-examination.

time (T90). The witness also stated that there is a lock on the door at present, but it does not work (T90). She said that there is a lock in the vestibule door to the building, which requires a key but it is not a good lock—it could be pushed open (T90-91).

52. The witness, in response to counsel's further questions, testified regarding her request to Petitioner's representative for replacement of a door saddle and the unmet promise to do the repair (T91-92); the continued problem of undesirables coming into the building from the park across the street (T93-94); the continued failure to clean the building's public areas (T94-95); and the witness' desire to live in decent and habitable conditions and her disinterest, otherwise, in what the owner may do with the building (T96-98).

53. The Department of Housing Preservation and Development then offered a computer print-out listing building violations and a copy of the proposed alterations plans (no. 1373/1983) as evidence, and then rested the department's case (T98-102).

54. Petitioner's attorney presented as his first witness an architectural consultant (T103). He stated that the plans for the proposed alteration of the subject premises show a "reconfiguration" of existing partitions, a minor addition of floor area on the third floor and a small penthouse added above the roof (T104). Also included, he said, was "new plumbing, heating, electricity, new finishes, . . . new windows, double pane" (T105). He noted that the plans show no change for apartments 4N and 5N and that their occupants would not have to vacate (T105). The witness testified that the electrical and plumbing systems required complete overhaul (T105-06).

55. The witness also testified regarding neighborhood conditions, stating that it is very run down physically and many of its buildings are in need of alteration (T106-07). The witness testified about the installation of a new heating system in the subject premises, although he said that he had nothing to do with its installation (T107). The witness stated that a violation was issued as a result of the installation of the new heating system because it was done without the necessary building permit (T107-108), and that, similarly, permits would be required for the installation of new electrical and plumbing systems (T108). The witness testified that his work could not be done as ordinary repairs but only under an altered building application (T108-109).

56. The witness was then cross-examined by the department's attorney. He stated that the current owners were responsible for installing the heating system in February 1984 (T110). The witness reiterated his earlier testimony that the electrical and plumbing systems were beyond repair (T110-11). The witness acknowledged, however, that if the building had been maintained properly, it would have been in better condition (T111).

57. The next and final witness to testify was Petitioner's president (T113). He stated that Petitioner contracted to purchase the buildilng on August 30, 1983, and took title in early October 1983 (T112). He testified that prior to closing title he sought to determine whether there were any findings of harassment regarding the building through a search by the title company providing Petitioner's title insurance (T113), and that no such finding was discovered (T113). He testified further that he did not know the predecessor in title or any of its stockholders, officers or principals prior to contracting to purchase the building,

that no one associated with Petitioner had any early connection with its predecessor in title, and that the purchase came about through a real estate broker (T113-15). He also testified that the purchase price was $310,000 cash to seller (T116).

58. The witness testified that prior to closing Petitioner expended $12,000 to $15,000 for installation of a new boiler, installed a fire-proof boiler enclosure and replaced the windows in apartments 5N and 4N (T115-16). After taking title, he said, Petitioner changed the cylinder to the front vestibule door lock and distributed keys to the remaining tenants, and has "maintained the buildings as best we could under the situation that the building finds itself in"—performing "various repairs" in apartment 5N and replacing the toilet (T116-117). With respect to apartment 5N, he also testified that the refrigerator was replaced, and a special line was run to accommodate the appliance and installed a new lock on her door (T118). The saddle under her door was replaced and the roof leak over her kitchen also was repaired (T118-19). The witness also stated that he believed that a rough coat of plaster was applied in the apartment and that it is scheduled for a final coat and painting (T119).

59. The witness testified further that he believed the outside door was not missing a lock (T119), stating that while there's no lock on the outer door the inner vestibule door is locked (T119). The witness said, in addition, that Petitioner has a superintendent "on payroll" and he cleans the halls once a week and replaces light bulbs (T120). (He stated that there had been a problem with the hall lights previously because they utilized incadescent bulbs, but these fixtures were recently replaced with flourescent lights [T120].) The witness testified that the

building "super" was paid $75 a month to clean the building, perform minor repairs and tend to the boiler (T121). The witness denied doing anything to harass the remaining tenants (T122), and responded in the affirmative to counsels question whether it was Petitioner's intention to have them remain in occupancy as rent controlled tenants (T122-23).

60. The witness next stated that if granted the necessary permit, Petitioner would replace the building's roof, and with respect to the vacant apartments: revamp entirely the building's plumbing and electrical systems, install new interior walls and partitions, install new kitchen and bathroom fixtures and appliances, install new floors—*i.e.*, create "brand-new" apartments (T123-24). With respect to the two occupied apartments, the witness stated that the occupants have been given the option of remaining with minor repairs, or temporarily relocating at Petitioner's expense to allow the rehabilitation of their units (T125).

61. The witness acknowledged receiving complaints about derelicts or others being in the building, and testified that the practice is to call the police and make on-site inspections (T126). He stated that a few windows had been "tinned," but neither the witness nor his staff have ever seen intruders on the premises (T126).

62. On cross-examination the witness stated that the repairs about which he earlier testified regarding apartment 5N were performed by Petitioner between June and September of 1984, before Petitioner acquired title (T127). He stated that to replace the roof without disturbing the current occupancy of apartment 5N, the new roof would have to be placed on the old roof in order for the tenant to remain in occupancy, but the matter has yet to be dis-

cussed with the tenant (T129). The witness also stated that the building was visited by Petitioner's agents or principles on six occasions regarding complaints about vagrants, but admitted that the entire building was not searched on those occasions (T129-30).

63. On re-direct, the witness stated that it was difficult doing repairs in apartment 5N because Petitioner does not have the keys and the tenant is frequently away; repairs have to be coordinated with her schedule (T132). He also stated that neither of the remaining two residential tenants have paid Petitioner rent (T133).

64. By a Finding Of Fact And Decision, dated September 24, 1984, the Hearing Officer upheld the Department of Housing Preservation and Development with respect to denial of the application for certification of no harrassment for the subject premises. (A copy of the Hearing Officer's decision is submitted herewith as Respondent's Exhibit "7".) The Hearing Officer concluded that the Department of Housing Preservation and Development proved by a preponderance of the evidence that:

a) the eviction and relocation practices of the owner did not satisfy all legal requirements; and
b) that harassment of tenants has occurred in the past and continues to occur at the subject premises.

(Respondent's Exhibit 7 at 6.)

65. The Hearing Officer's Finding Of Fact And Decision was then forwarded to the Anti-Harassment Unit for transmittal to the Deputy Commissioner, pursuant to Zoning Resolution §96-109, for determination of Petitioner's application for certification of no harassment.

66. By determination dated October 12, 1984, the Deputy Commissioner adopted the findings and decision of the Hearing Officer and denied the application for certification of no harassment. (A copy of the Deputy Commissioner's determination is submitted herewith as Respondent's Exhibit "8").

AS FOR A FIRST AFFIRMATIVE DEFENSE:

67. The determination of the Deputy Commissioner denying Petitioner's application for certification of no harassment is in all respects reasonable and rational, and is fully supported by the record.

68. In this regard, Respondent respectfully notes that the Court's review of the said determination is limited, in part, to whether the Deputy Commissioner's determination was rational based upon the record of the within administrative proceeding. (CPLR §7803[3].) The reviewing Court may not substitute its judgment of the facts for that of the administrative officer, but only review the determination to ensure that it has warrant in the record.

69. The record shows that a fact finder could reasonably conclude that there was harassment of tenants in occupancy of the subject premises which caused such occupants to quit the premises and that eight tenants did vacate the building during a continued the pattern of harassment which was begun in 1976. The fact finder could also reasonably conclude, based upon the record, that illegal acts constituting harassment were ongoing after Petitioner acquired its fee interest in the subject premises.

70. The finding of the Hearing Officer, adopted by the Deputy Commissioner and pursuant to which certification of no harassment was denied, contains a summary of the testimony and evidence in the record which supports the conclusion that there was harassment of tenants in the subject premises. In particular, it notes the uncontroverted testimony of Helen Tritschler, a tenant in the building for the past fifty years, that acts of harassment occurred during the period 1976-1983, including a declining level of building services, lack of adequate security and other instances of neglect. (Respondent's Exhibit 7 at 4.) While acknowledging evidence of improvements made since October 1983, when Petitioner acquired its fee interest in the subject premises, the Hearing Officer's finding also credits the testimony of Ms. Tritschler regarding the regular presence of squatters and the overall lack of building security. (Respondent's Exhibit 7 at 5.) In this regard, the Hearing Officer found that Petitioner's documentary evidence regarding the salary it paid to someone to act as building superintendent was insufficient to rebut the sworn testimony of Ms. Tritschler regarding the lack of janitorial services. (Respondent's Exhibit 7 at 5.) Based upon the testimony and evidence before him, the Hearing Officer also found that the level of services provided by the current owner, *i.e.*, Petitioner, continues to be unlawful; that essential services were not being regularly provided and, as such, Petitioner's actions were unlawful and calculated to evict or relocate Ms. Tritschler. (Respondent's Exhibit 6 at 5.)

71. A review of the entire record of the hearing held regarding Petitioner's application for certification of no harassment reveals that there is sound basis in the record for the finding of fact adopted by the Deputy Commissioner.

72. There was ample evidence regarding the withdrawal of essential services by Petitioner's predecessor in title and the resultant deterioration of conditions in the building. (See *supra*, ¶¶ 42, 43, 45, and 47.) The record contains evidence, as well, of the decline in building security, at the hands of the prior owner, and the influx into the building of drug addicts and other undesirables. (See *supra*, ¶ 44.) There was also evidence regarding the flight from the building of the building's lawful tenants as a consequence of these acts by Petitioner's predecessor in title or its agents. (See *supra*, ¶¶ 46 and 48.) There is no evidence in the record which in any manner controverts the foregoing.

73. The record of the within administrative proceeding also contains evidence, in the form of sworn testimony, regarding continued problems with building services and security under Petitioner's ownership of the subject premises. There is evidence that the problems with the lock on the building's entrance door is ongoing. (See *supra*, ¶¶ 44 and 50.) The record contains evidence that there is still a serious problem with drug addicts and others unlawfully occupying the subject premises—and that this has caused fear in at least one of the building's two remaining legal tenants. (See *supra*, ¶ 44.) The evidence is that Petitioner's representatives have been informed of this situation repeatedly, but it persists nevertheless (See *supra*, ¶¶ 44, 59 and 60.) The record also is replete with evidence concerning the lack of essential services and the failure to do repairs since Petitioner acquired the subject premises. (See *supra*, ¶¶ 45, 47, 50 and 51.)

74. Concededly, there was testimony presented on Petitioner's behalf—principally by its president—which indicated that there was janitorial services provided and repair work done in the building. (See *supra*, ¶¶ 54, 57,

58.). However, the presence of such conflicting evidence does not in any way detract from the reasonableness and rationality of Respondent's determination. It was for the Deputy Commissioner to accept that evidence which she deemed to be credible and reject that which she found unpersuasive. As is noted hereinabove, the Court's inquiry regarding the evidence ends if the record reveals evidence to support the challenged determination, notwithstanding additional conflicting testimony.

75. Accordingly, the record fully supports the determination that there indeed has been a course of conduct on the part of the owner of the subject premises, including both Petitioner and its predecessor, in title and their respective agents or representatives, which constitute harassment.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

76. The determination of the Deputy Commissioner denying Petitioner's application for certification of no harassment is in all respects lawful and proper.

77. The responsibility for determining applications for certifications of no harassment pursuant to Zoning Resolution §96-109 reposes solely in the Commissioner. (See *supra*, ¶¶ 31 and 32.) The Commissioner, in accordance with the power vested on him by the New York City Charter, has delegated the duty to determine applications pursuant to Zoning Resolution §96-109 to the Deputy Commissioner. (See *supra*, ¶33.)

78. As a matter of administrative convenience, the Commissioner relies upon a hearing officer in the employ of the Department of Housing Preservation and Develop-

ment to receive testimony and evidence regarding an application for a certification of no harassment. The hearing officer renders a finding of fact and decision. However, it is the Deputy Commissioner, pursuant to her delegation from the Commissioner, who actually determines the application for certification of no harassment. (Zoning Resolution §96-109.) The Deputy Commissioner may accept the Hearing Officer's finding of fact, as is the case with respect to the instant matter, or she may reject the Hearing Officer's conclusion and make her own finding of fact and decision. This is in accord with the common and accepted practice among administrative bodies and officers who perform quasi-judicial function.

79. The Hearing Officer made his finding of fact and rendered his decision regarding Petitioner's application on or about September 24, 1985.

80. The said Finding Of Fact And Decision, in accordance with the above-noted agency procedure, was transmitted to the Deputy Commissioner, through the Anti-Harassment Unit, for the purpose of determining Petitioner's application.

81. Upon adopting the Hearing Officer's Finding Of Fact And Decision, by determination dated October 12, 1984, the Deputy Commissioner denied Petitioner's application for certification of no harassment.

82. Petitioner's complaint that it was in some fashion improper for the Hearing Officer's Finding Of Fact And Decision to be transmitted to the Deputy Commissioner through the Anti-Harassment Unit is without any basis in law or fact. The decision was not sent to the Anti-Harassment Unit for its approval. Under no circumstances

would have the Finding Of Fact And Decision of the Hearing Officer, dated September 24, 1984, been altered in any fashion, notwithstanding any disagreement by the attorney of the Anti-Harassment Unit who prosecuted the matter or any official of the Department of Housing Preservation and Development.

83. The Finding Of Fact And Decision of the Hearing Officer was, pursuant to Zoning Resolution §96-109, not a final determination* and, as a consequence, it was transmitted to the Deputy Commissioner for review and determination in accordance with the mandate of §96-109 that the Commissioner certify whether there was harassment of tenants in a building located in the Preservation Area of the Special Clinton District for which an alteration permit is sought from the Department of Building.

84. Accordingly, the procedure by which Petitioner's application was determined comported fully with the requirements of law and, in no respect, was it improper.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE:

85. The administrative proceeding pursuant to which Petitioner's application for certification of no harassment was denied comported fully with the requirements of due process.

86. Petitioner was given notice of the specific charges made in support of the finding of probable cause that harassment occurred at the subject premises and of the

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*There has been no delegation of the Commissioner's ultimate responsibility to determine an application for certification of no harassment to the department's hearing officers.

time and place of the hearing regarding said charges. The Notice of Hearing set forth in ten enumerated paragraphs the details of the charges. (See *supra*, ¶ 40.)

87. Petitioner was represented by legal counsel at the hearing, held on July 18, 1985, and his attorney was given the opportunity to call witnesses, present evidence and cross-examine the witnesses called by the Department of Housing Preservation and Development.

88. Petitioner's contention that it did not have notice of the complaint, developed during the direct examination of Helene Tritschler at the July 18th hearing, that the subject premises, during the period of ownership by Petitioner, was occupied by persons who were without any legal right to occupancy, is belied by the record. Paragraph "2" of the specified conditions contained in the Notice of Hearing (Respondent's Exhibit 5), states in relevant part:

> * * * In addition, several squatters have since taken up residency at the premises.

Clearly, the Department had fairly given Petitioner notice of the allegation that squatters were in occupancy at the premises. Furthermore, would there have been evidence or witnesses that Petitioner's attorney wished to present but which were unavailable at the time of the hearing, its counsel could have made an appropriate application.

89. The record demonstrates that Petitioner was accorded all the process which was due regarding the within administrative proceeding.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE:

90. Petitioner's claim that §96-109 of the Zoning Resolution is unconstitutional on its face and as applied, is improperly before the Court. Section 96-109 is a legislative enactment of the City of New York adopted as an amendment to the Zoning Resolution by the Board of Estimate, pursuant to §200 of the New York City Charter, and, as such, may be challenged only by an action for declaratory judgment. Furthermore, Petitioner is required to name as a defendant The City of New York in order to obtain a judgment declaring invalid a provision of the City's Zoning Resolution.

91. Notwithstanding the foregoing, Section 96-109 of the Zoning Resolution, pursuant to which Respondent denied Petitioner's application for certification of no harassment, thereby barring substantial alteration of the subject premises, constitutes a reasonable and valid exercise of the power of the City, for the general health and welfare, to control the use and development of property, and did not effect a taking of Petitioner's property without due process of law. It is beyond question that a municipality may impose restrictions on the use and development of property for promotion of the general health and welfare of its populace.

92. A stated goal of the Special Clinton District is to preserve the scale and mixture of income groups existent in the area at the time of the adoption of the Special Clinton District regulations (Zoning Resolution Article IX, Chapter 6). (See Zoning Resolution §96-00[b].) Section 96-109 is designed to remove the economic incentive from the various forms of harassment used by some owners of buildings in the "Preservation Area" of the Special Clin-

ton District. These owners, by such conduct, seek to oust existing Clinton tenants to facilitate the conversion of their buildings to new and lucrative market rate housing. This is contrary to the stated goals of this district. (See Zoning Resolution §96-00.)*

93. Although Respondent has determined that there was harassment of tenants at the subject premises, and Petitioner is thus precluded from substantially altering the subject premises, Petitioner may still use and occupy the existing residential units of the subject premises. It may perform any repairs or incidental alterations necessary to such use and occupancy. In this regard, the subject premises may be maintained in the same manner that it had been occupied for many years, and comparable to the use to which hundreds of similar residential buildings in Clinton and throughout the City of New York are presently being put.

94. A taking of property occurs only when a property owner is deprived of any use of his property for which it is reasonably adapted. Most certainly, Petitioner has not been denied all beneficial use of its property. The occupancy of the existing residential units of the subject premises clearly must be deemed a use for which the subject premises was and is reasonably adapted. As such, the denial of certification does not result in an unconstitutional deprivation of Petitioner's property.

95. Section 96-109 of the Zoning Resolution is rationally related to a legitmate purpose involving the control of

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*Petitioner's conclusory allegations notwithstanding, the "upgrading" (i.e., alteration) of buildings which does violence to the socio-economic composition of the area's population is inconsistent with the goals of the district.

the use and development of residential properties situated in the Preservation Area of the Special Clinton District. Furthermore, as applied to the subject premises §96-109 does not prevent Petitioner's use of the property for the use for which it is reasonably adapted.

WHEREFORE, Respondent, by its attorney Frederick A. O. Schwarz, Jr. Corporation Counsel of the City of New York, requests judgment denying the Petition and dismissing the proceeding in all respects, declaring that §96-109 of the Zoning Resolution is, on its face and as applied to the subject premises, a constitutional zoning enactment, and granting such other and further relief as may appear to the Court to be just, proper and equitable together with costs.

Dated: New York, New York
March 25, 1985

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the City of New York
Attorney for Respondent
100 Church Street, Room 5J20
New York, New York 10007
Tel: (212) 566-4290

(Verified by Carol Felstein, March 25, 1985.)

Order of Transferral to Appellate Division for Direct Review.

SUPREME COURT OF THE STATE OF NEW YORK,

NEW YORK COUNTY.

Special Term Part I

at the Courthouse thereof, 60 Centre Street,
New York, New York, 10007.

Present:
Hon. David H. Edwards Jr., Justice.

FBK REALTY

against

GLIEDMAN

The following papers numbered 1 to 6 read on this motion, submitted

	Papers Numbered
No. 50 on Calendar of 4/18/85	
Notice of Motion—Order to Show Cause—and Affidavits Annexed	1-3
Answering Affidavit	4
Replying Affidavit	5
Pleadings—Exhibit (marked)	6

In this Article 78 proceeding, an issue is presented as to whether the determination of respondent made after a hearing held pursuant to law is supported by substantial evidence on the entire record (CPLR 7803[4]). Accordingly, pursuant to CPLR 7804(g), this proceeding is transferred to the Appellate Division. First Department for determination.

Dated Jun 11 1985

Filed Jun 18 1985
County Clerk's Office
New York

DHE
J.S.C.

Briefs: Petitioner's Respondent's
County Clerk's No. 3/2/1985
Spec I Liber F27 Line 1, 1985

Order of Appellate Division, First Department, Confirming Administrative Determination.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on

Present—Hon. Theodore R. Kupferman,
Justice Presiding

Leonard H. Sandler
David Ross
Sidney H. Asch
E. Leo Milonas

Justices

IN THE MATTER

OF

FBK REALTY CORP.,

Petitioner,

against

ANTHONY GLIEDMAN, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

For Judgment Under CPLR Article 78 and CPLR Section 3001.

The above-named petitioner having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination of the respondent dated October 12, 1984,

And this proceeding having been transferred by order of said court, entered on June 18, 1985 (David Edwards, Jr., J.) to this Court for review and determination,

And said proceeding having duly come on to be heard before this Court and having been argued by Stanford M. Singer of counsel for the petitioner, and by Karen Hutson of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondent be and the same hereby is confirmed, without costs and without disbursements. The clerk is directed to enter judgment in favor of respondent, confirming the determination.

ENTER:

HAROLD J. REYNOLDS
Clerk.

Notice of Appeal to the Court of Appeals.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

IN THE MATTER

OF

FBK REALTY CORP.,

Petitioner-Appellant,

against

ANTHONY GLIEDMAN, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent-Respondent.

Index No. 312/85

SIR:

PLEASE TAKE NOTICE that the petitioner, relying solely upon a question directly involving the construction of the provisions of Article I, §6 of the Constitution of the State of New York and the Fourteenth Amendment to the Constitution of the United States, appeals as of right to the

Court of Appeals of the State of New York from the order of the Appellate Division, First Department, entered in the office of the Clerk of the Appellate Division on December 3, 1985, which unanimously confirmed the determination of the respondent dated October 12, 1984, as to which the Supreme Court, New York County, transferred the within proceeding by order entered June 18, 1985 to the Appellate Division, First Department for initial review and determination, and petitioner appeals from each and every part of the order of the Appellate Division, as well as from the whole thereof.

Dated: New York, New York
January 3, 1985

ABRAMS LERNER KISSELOFF KISSIN
& LAPIDUS, P.C.
Attorneys for Petitioner-Appellant
1350 Avenue of the Americas
New York, New York 10019
(212) 581-8600

To:

Clerk of the County of New York
Frederick A. O. Schwarz, Jr.
Corporation Counsel of the City of New York
Attorney for Respondent-Respondent
100 Church Street
Room 5J20
New York, New York 10007

Order of Court of Appeals Dismissing Appeal.

COURT OF APPEALS,

STATE OF NEW YORK.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of April A.D. 1986.

Present:

Hon. Sol Wachtler, Chief Judge, presiding.

1 Mo. No. 357 SSD 50

IN THE MATTER

OF

FBK REALTY CORP.,

Appellant,

vs.

ANTHONY GLIEDMAN, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent,

For a Judgment & c.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

DONALD M. SHERAW
Clerk of the Court

(Seal)

Notice of Motion in the Appellate Division for Leave to Appeal to the Court of Appeals.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—FIRST DEPARTMENT.

IN THE MATTER

OF

FBK REALTY CORP.,

Petitioner,

against

ANTHONY GLIEDMAN, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

Calendar No. 25010

SIR:

Please Take Notice that upon the annexed affirmation of Stanford M. Singer, dated May 7, 1986, and upon the Order entered and filed in the office of the Clerk of the Court of Appeals of the State of New York on April 1,

1986, dismissing an appeal brought pursuant to C.P.L.R. §5601(b), and upon the Order of this Court, confirming, on direct review pursuant to C.P.L.R. §7304(g), the determination of the respondent, entered in the office of the Clerk of this Court on December 3, 1985, and upon the Record on Review by this Court pursuant to the Order of Transferral entered in the office of the Clerk of the County of New York on June 18, 1985, and upon all prior proceedings, the undersigned will move this Court at a term to be held at the Court House, 27 Madison Avenue, New York, New York on the 27th day of May, 1986, at 10:00 o'clock in the forenoon of that day, for an Order granting leave to the petitioner to appeal to the Court of Appeals from the Order of this Court, upon the ground that the respondent's determination is invalid, as having been made pursuant to §96-109 of the Zoning Resolution of the City of New York, either unconstitutional on its face or as applied and having been obtained by a clear denial of procedural due process of law, and upon the ground that the evidence before respondent was insufficient as a matter of law to sustain the respondent's determination, and for the certificate of this Court certifying questions of law decisive of the correctness of its determination in that such issues involve questions of law which ought to be reviewed by the Court of Appeals, and for such other and further relief which as to the Court may seem just and proper.

Please Take Further Notice that, pursuant to C.P.L.R. Rule 2214(b), answering affidavits, if any, must be served upon the undersigned at least seven (7) days before the return date of this motion.

Dated: New York, New York
May 7, 1986

Yours, etc.

ABRAMS LERNER KISSELOFF
KISSIN & LAPIDUS, P.C.
Attorneys for Petitioner
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(212) 581-8600

To:

Frederick A. O. Schwarz, Jr.
Corporation Counsel for the City of New York
Attorney for Respondent
100 Church Street
Room 5J20
New York, New York 10007
(212) 566-4290

Affirmation of Stanford M. Singer in Support of Motion for Leave to Appeal to the Court of Appeals.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT.

IN THE MATTER

OF

FBK REALTY CORP.,

Petitioner,

against

ANTHONY GLIEDMAN, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

Calendar No. 25010

State of New York,
County of New York, ss.:

STANFORD M. SINGER, an attorney duly admitted to practice before the courts of the State of New York, af-

firms the following, pursuant to C.P.L.R. Rule 2106, on penalties of perjury:

1. I am associated with Abrams Lerner Kisseloff Kissin & Lapidus, P.C., attorneys for the petitioner in the above-captioned matter. I make this affirmation in support of the within motion for leave to appeal to the Court of Appeals. The following statements are made on the basis of personal knowledge or upon information and belief, as to which latter matters I believe them to be true.

2. This matter was originally before this Court pursuant to the Order of the Supreme Court, New York County, Special Term, Part I (David H. Edwards, J.), transferring the matter to this Court for direct review pursuant to C.P.L.R. §7804(g) (Exhibit "A"). The issues presented on review were as follows: (1) Is §96-109 of the Zoning Resolution of the City of New York unconstitutional on its face? (2) In the alternative, is said §96-109 unconstitutional as applied by the respondent to the within petitioner? (3) Did the conduct of the hearing before the respondent deny the petitioner due process of law? (4) Was the evidence before the respondent sufficient, as a matter of law, to support the respondent's factual determination?

3. This Court confirmed the respondent's decision without opinion (Exhibit "B"). The petitioner thereupon served and filed a Notice of Appeal to the Court of Appeals, premised upon the constitutional issue (Exhibit "C"), which appeal was dismissed by the Court of Appeals in an Order entered in the Office of the Clerk of the Court of Appeals on April 1, 1986 (Exhibit "D"), notice of which entry was served by the Clerk of the Court of Appeals by regular U.S. Mail, postmarked April 3, 1986 (Ex-

hibit "E"). We hereby move for a leave to appeal within thirty days of notice of entry of the Court of Appeals' Order. C.P.L.R. Rule 2103(b), subd. 2.

4. As originally noted to this Court, §96-109 of the Zoning Resolution of the City of New York is unconstitutional on its face. In the alternative, if the expression "owner," as used in that section, does not necessarily refer to all *prior* owners in the chain of title, then it is unconstitutional as applied by the respondent, who has interpreted that expression in such manner. We submit that the fact that the Court of Appeals dismissed the original appeal is not dispositive of a motion for leave to appeal on this issue, which is of constitutional magnitude.

5. The Record shows, moreover, a substantial denial of due process, inasmuch as the respondent's hearing officer, who made the administrative decision in issue, was required to have the decision approved by opposing counsel before it could be formally entered. Inasmuch as it might be readily inferred that such unconstitutional practice is standard operating procedure in administrative hearings before the respondent pursuant to §96-109, it is of substantial importance as a matter of law, properly the subject of review by the Court of Appeals.

6. The respondent's finding that the within petitioner engage in alleged "harassment" is not dispositive of the constitutional issues, contrary to the position taken by the respondent before the Court of Appeals. On the contrary, we present herein the issue of the respondent's fact-finding for review by the Court of Appeals. Since we assert that the evidence before the respondent was insufficient *as a matter of law* to sustain the determination, it is properly subject to review by the Court of Appeals. N.Y. Const.,

Art. 6, §3, subd. (a). *People v. Cosme,* 48 N.Y.2d 286 (1979).

WHEREFORE it is respectfully requested that the petitioner be granted leave to appeal to the Court of Appeals upon questions to be certified by this Court, as follows:

(1) Is §96-109 of the Zoning Resolution of the City of New York unconstitutional on its face?

(2) Is §96-109 of the Zoning Resolution of the City of New York unconstitutional as applied by the respondent?

(3) Did the conduct of the administrative hearing before the respondent deny the petitioner due process of law?

(4) Was the evidence before the respondent sufficient as a matter of law, to sustain the respondent's factual determination of "harassment?"

Dated: New York, New York
May 7, 1986

STANFORD M. SINGER

Exhibit A, Attached to Affirmation of Stanford M. Singer —Order of Transferral to Appellate Division for Direct Review.

(Reproduced, *supra,* at pp. 64a to 65a.)

Exhibit B, Attached to Affirmation of Stanford M. Singer —Order of Appellate Division, First Department, Confirming Administrative Determination.

(Reproduced, *supra,* at pp. 66a to 67a.)

Exhibit C, Attached to Affirmation of Stanford M. Singer —Notice of Appeal to the Court of Appeals.

(Reproduced, *supra,* at pp. 68a to 69a.)

Exhibit D, Attached to Affirmation of Stanford M. Singer —Order of Court of Appeals Dismissing Appeal.

(Reproduced, *supra,* at pp. 70a to 71a.)

Exhibit E, Attached to Affirmation of Stanford M. Singer —Postmarked Envelopes.

State of New York
Court of Appeals
Clerk's Office
Albany 12207

Abrams Lerner Kisseloff
Kissin & Lapidus, P.C.
Attn: Stanford M. Singer, Esq.
1350 Avenue of the Americas
New York, NY 10019

EBK Realty v. Gliedman

State of New York
Court of Appeals
Clerk's Office
Albany 12207

Abrams, Lerner Kisseloff Kissin
& Lapidus, P.C.
1350 Avenue of the Americas
New York, NY 10019

Order of Appellate Division Denying Leave to Appeal to the Court of Appeals.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 12, 1986.

Present: Hon. Theodore R. Kupferman,
Justice Presiding.
Leonard H. Sandler,
David Ross,
Sidney H. Asch,
E. Leo Milonas,
Justices.

IN THE MATTER

OF

FBK REALTY CORP.,

Petitioner,

against

ANTHONY GLIEDMAN, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

For Judgment Under CPLR Article 78 and CPLR Section 3001.

M-2171 [25010]

The petitioner having moved for leave to appeal to the Court of Appeals from the order of this Court entered on December 3, 1985,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and those filed in opposition or in relation thereto, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied, with $20 costs.

Enter:

HAROLD J. REYNOLDS
Clerk

Notice of Motion in Court of Appeals for Leave to Appeal to the Court of Appeals.

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

IN THE MATTER

OF

FBK REALTY CORP.,

Petitioner,

against

ANTHONY GLIEDMAN, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

Appellate Division Calendar No. 25010.

S I R :

PLEASE TAKE NOTICE that upon the annexed affirmation of Stanford M. Singer, dated July 21, 1986, and upon

the order of the Supreme Court, Appellate Division, First Department, confirming, on direct review pursuant to C.P.L.R. 7804(g), the determination of the respondent, entered in the office of the Clerk of the Appellate Division, First Department on December 3, 1985, and upon the Order entered and filed in the office of the Clerk of this Court on April 1, 1986, dismissing an appeal brought pursuant to C.P.L.R. 5601(b), and upon the order of the Appellate Division, First Department, dated June 12, 1986, denying the petitioner leave to appeal to this Court, notice of entry of which order was served upon the petitioner by the respondent by regular U.S. mail on June 16, 1986, and upon the Record on Review by the Appellate Division, First Department pursuant to the Order of transferral entered in the office of the Clerk of the County of New York on June 18, 1985, and upon all prior proceedings, the undersigned will move this Court at a term to be held at Court of Appeals Hall, 20 Eagle Street, Albany, New York on the 4th day of August, 1986, for an Order granting leave to the petitioner to appeal to this Court from the Order of the Appellate Division, First Department, upon the ground that the respondent's determination is invalid, as having been made pursuant to §96-109 of the Zoning Resolution of the City of New York, either unconstitutional on its face or as applied, and having been obtained by a clear denial of procedural due process of law, and upon the ground that the evidence before the respondent was insufficient as a matter of law to sustain

the respondent's determination, and for such other and further relief which as to the Court may seem just and proper.

Dated: New York, New York
July 21, 1986

Yours, etc.

ABRAMS LERNER KISSELOFF KISSIN
& LAPIDUS, P.C.
Attorneys for Petitioner
1350 Avenue of the Americas
New York, New York 10019
(212) 581-8600

To:

Frederick A. O. Schwarz, Jr.
Corporation Counsel for the City of New York
Attorney for Respondent
100 Church Street
Room 5J20
New York, New York 10007
(212) 566-4290

Affirmation of Stanford M. Singer in Support of Motion for Leave to Appeal to the Court of Appeals.

COURT OF APPEALS

OF THE STATE OF NEW YORK.

IN THE MATTER

OF

FBK REALTY CORP.,

Petitioner,

against

ANTHONY GLIEDMAN, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

Appellate Division Calendar No. 25010

State of New York,
County of New York, ss:

STANFORD M. SINGER, an attorney duly admitted to practice before the courts of the State of New York, affirms the following, pursuant to C.P.L.R. Rule 2106, on penalties of perjury:

1. I am associated with Abrams Lerner Kisseloff Kissin & Lapidus, P.C., attorneys for the petitioner in the above-captioned matter. I make this affirmation in support of the within motion for leave to appeal to this Court from the determination of the Supreme Court, Appellate Division, First Department. The following statements are made on the basis of personal knowledge or upon information and belief, as to which latter matters I believe them to be true.

2. This matter was originally before the Appellate Division, First Department pursuant to the order of the Supreme Court, New York County, Special Term, Part I (David H. Edwards, J.), transferring the matter to the Appellate Division for direct review pursuant to C.P.L.R. §7804(g) (Exhibit "A"). The issues presented on review were as follows: (1) Is §96-109 of the Zoning Resolution of the City of New York unconstitutional on its face? (2) In the alternative, is said §96-109 unconstitutional as applied by the respondent to the within petitioner? (3) Did the conduct of the hearing before the respondent deny the petitioner due process of law? (4) Was the evidence before the respondent sufficient, as a matter of law, to support the respondent's factual determination?

3. The Appellate Division confirmed the respondent's decision without opinion (Exhibit "B"). The petitioner thereupon served and filed a Notice of Appeal to this Court, premised upon the constitutional issue (Exhibit "C"), which appeal was dismissed by this Court in an Order entered in the office of the Clerk of this Court on April 1, 1986 (Exhibit "D"), notice of which entry was served by the Clerk of the Court of Appeals by regular U.S. Mail, postmarked April 3, 1986 (Exhibit "E").

4. Petitioner thereupon moved for leave to appeal to this Court, in the Appellate Division, within thirty days of notice of entry of this Court's order, pursuant to C.P.L.R. Rule 2103(b), subd. 2. Leave to appeal was denied by the Appellate Division in an order dated June 12, 1986 (Exhibit "F"), notice of entry of which order was served by regular U.S. Mail, postmarked June 16, 1986. As set forth on the annexed affidavit of service, service of the within motion is served this day upon the respondent and is, therefore, timely pursuant to C.P.L.R. Rule 2103(b), subd. 2 and C.P.L.R. §5513(b).

5. As originally noted to the Appellate Division, and as set forth in the annexed brief in support of the within motion, §96-109 of the Zoning Resolution of the City of New York is unconstitutional on its face. In the alternative, if the expression "owner," as used in that Section, does not necessarily refer to all *prior* owners in the chain of title, then it is unconstitutional as applied by the respondent, who has interpreted that expression in such manner. We submit that the fact that this Court dismissed the original appeal is not dispositive of a motion for leave to appeal on this issue, which remains of constitutional magnitude.

6. The Record shows, moreover, a substantial denial of due process, inasmuch as the respondent's hearing officer, who made the administrative decision in issue, was required to have the decision approved by opposing counsel before it could be formally entered. Inasmuch as it might be readily inferred that such unconstitutional practice is standard operating procedure in administrative hearings before the respondent pursuant to §96-109, it is of substantial importance as a matter of law, properly the subject of review by this Court.

7. The respondent's finding that the within petitioner engage in alleged "harassment" is not dispositive of the constitutional issues, contrary to the position taken by the respondent before the Appellate Division. On the contrary, we present herein the issue of respondent's fact-finding for review by this Court. Since we assert that the evidence before the respondent was insufficient as a *matter of law* to sustain the determination, it is properly subject to review by this Court, as set forth in the annexed brief in support of this motion.

WHEREFORE, it is respectfully requested that the petitioner be granted leave to appeal to this Court from the determination of the Appellate Division, and that petitioner be granted such other and further relief which as to the Court may seem just and proper.

Dated: New York, New York
July 21, 1986

STANFORD M. SINGER

Exhibit A, Attached to Affirmation of Stanford M. Singer —Order of Transferral to Appellate Division for Direct Review.

(Reproduced, *supra,* at pp. 64a to 65a.)

Exhibit B, Attached to Affirmation of Stanford M. Singer —Order of Appellate Division, First Department, Confirming Administrative Determination.

(Reproduced, *supra,* at pp. 66a to 67a.)

Exhibit C, Attached to Affirmation of Stanford M. Singer —Notice of Appeal to the Court of Appeals.

(Reproduced, *supra,* at pp. 68a to 69a.)

Exhibit D, Attached to Affirmation of Stanford M. Singer —Order of Court of Appeals Dismissing Appeal.

(Reproduced, *supra,* at pp. 70a to 71a.)

Exhibit E, Attached to Affirmation of Stanford M. Singer —Postmarked Envelopes.

(Reproduced, *supra,* at pp. 80a to 81a.)

Exhibit F, Attached to Affirmation of Stanford M. Singer —Order of Appellate Division Denying Leave to Appeal to the Court of Appeals.

(Reproduced, *supra,* at pp. 82a to 83a.)

Order of the Court of Appeals Denying Leave to Appeal.

1-10 Mo. No. 871

IN THE MATTER

OF

FBK REALTY CORP.,

Appellant,

v.

ANTHONY GLIEDMAN, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

Motion for leave to appeal denied.

(3)

Supreme Court, U.S.
FILED
FEB 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1153
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

FBK REALTY CORP.,

Petitioner,

-against-

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PETER L. ZIMROTH,
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Attorney for Respondent,
100 Church Street,
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(212) 566-4330 or 5549

FAY LEOUSSIS,
KAREN HUTSON,
of Counsel.

February 18, 1987.

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36 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Is section 96-109 of the New York City Zoning Resolution unconstitutional on its face when, to preserve the socio-economic character of the Special Clinton District in the face of rapid gentrification, the section permits building renovations that require an alteration permit only if the tenants in the building have not been harassed?

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No. 86-1153
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

FBK REALTY CORP.,

Petitioner,

-against-

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME.COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

STATEMENT OF THE CASE

In October, 1983, petitioner purchased a building at 468 West 47th Street in the borough of Manhattan in New York City located in the Special Clinton District (13a).[1]

---

[1]Numbers in parentheses refer to pages of
(Footnote Continued)

The Special Clinton District was established in 1975 by Article IX, Chapter 6 of the New York City Zoning Resolution (37a). Clinton, historically known as Hell's Kitchen, is bounded on the east and west by Eighth and Twelfth Avenues and on the north and south by 59th and 41st Streets (37a).

Section 96-00 of the Zoning Resolution provides, in relevant part, that the Special Clinton District's location -- between the waterfront and Convention Center on the west and a "growing central business district," Times Square, on the east -- requires specific programs and regulations to realize community and City-wide goals. Those goals are preserving and strengthening the residential character of the community and permitting rehabilitation

---

(Footnote Continued)
petitioner's Appendix to its Petition for a Writ of Certiorari.

and new construction consistent with the current existing scale of the community and "at rental levels which will not substantially alter the mixture of income groups presently residing in the area." Zon. Res. § 96-00(a),(b) (emphasis added). Section 96-109 of the Zoning Resolution provides (1a):

> Alteration of buildings
>
> Prior to the issuance of an alteration permit by the Department of Buildings for an alteration other than an incidental alteration for a building containing residential uses within the Preservation Area, the Administrator of [New York City's Department of Housing Preservation and Development, "HPD"] shall certify to the Department of Buildings:
>
> (a) That prior to evicting or otherwise terminating the occupancy of any tenant preparatory to alteration, the owner shall have notified [HPD] of his intention to alter the building;
>
> (b) That the eviction and relocation practices followed

> by the owner of the building satisfy all applicable legal requirements and that no harassment has occurred [emphasis in original denotes terms defined in section 12-10 of the Zoning Resolution].

Thus, before New York City's Department of Buildings can issue an alteration permit for a building located within the "Preservation Area" of the Special Clinton District, HPD must certify that harassment was not used to displace established residents from the building. This provision is intended to remove the economic incentive to the harassment of residents of the Clinton neighborhood and thereby preserve the current mixture of income groups (38a). Petitioner's building is in the "Preservation Area."

On or about September 20, 1983, petitioner filed with the New York City Department of Buildings an application seeking a permit that would allow petitioner

to renovate its entire building and create additional apartments. The Department of Buildings did not issue the alteration permit because petitioner did not have certification of no harassment from HPD (39a).

By letter dated December 13, 1983, petitioner sought certification of no harassment from the Clinton Neighborhood Preservation Office, an office of HPD (39a). Petitioner's president, James Hefelfinger, submitted an affidavit in which he stated that petitioner had not harassed any tenant to induce the tenant to vacate her apartment.

The Clinton Neighborhood Preservation Office works to preserve and rehabilitate the housing stock in the Clinton area and seeks to prevent displacement of tenants from buildings that are upgraded. In this case, the Clinton Neighborhood Preservation Office followed its standard procedure for review of

requests for certification of no harassment, conducted an investigation, and referred petitioner's application to the Single Room Occupancy ("SRO") Anti-Harassment Unit of HPD's Office of Rent and Housing Maintenance, Division of Evaluation and Compliance. Based upon the file referred by the Clinton Neighborhood Preservation Office, the SRO Anti-Harassment Unit recommended that the HPD Commissioner issue a finding of reasonable cause to believe that harassment had occurred at petitioner's building (40a).

HPD's Commissioner issued a finding that there was reasonable cause to believe that harassment had occurred, and a copy of that finding was mailed on or about May 25, 1984 to James Hefelfinger as applicant on behalf of petitioner (40a).

By a notice dated July 5, 1984, HPD notified petitioner that a hearing would be

held on July 18, 1984 regarding the request for certification pursuant to Section 96-109 of the Zoning Resolution (40a). HPD's notice further alleged generally that the "fee owner" of 468 West 47th Street had harassed the tenants and also set forth specific conduct which was alleged to be harassment: the failure to maintain and repair, the failure to provide security, heat, and hot water, and inducing tenants to vacate their apartments (41a-42a).

A hearing was conducted on July 18, 1984 by an HPD hearing officer, and both petitioner and HPD were represented by legal counsel who called and cross-examined witnesses and presented documentary evidence (42a-43a). In its Petition for a Writ of Certiorari, petitioner states that it assumes "the factual correctness of HPD's finding that FBK had 'harassed' tenants and committed unlawful eviction practices ...."

(Petition at 10). Therefore, respondent will not repeat the testimony offered at the hearing concerning harassment.

However, concerning its claim that section 96-109 of the Zoning Resolution is a taking of its property, the only proof petitioner offered of the value and supposed diminution in value of its property was its purchase price of approximately $310,000 and its architect's testimony that alteration plans called for new apartments, including a penthouse apartment. In fact, the architect testified that "[t]he major extent of the work is simply putting up new partitions. Structurally it's a very sound building." The plans also included installing new plumbing, heating, and "new finishes." The architect testified that the plumbing was "beyond repair" and that a completely new electrical system had to be installed.

No one testified that incidental repairs, which do not require an alteration permit, could not be made; no one testified that an application to make incidental repairs had been made and denied; and no one testified what the resale value of the building was, before or after the proposed alteration. No one testified that the building could not be sold or that it was economically worthless.

The hearing officer concluded that HPD had proved by a preponderance of the evidence that petitioner's eviction and relocation practices were not lawful and that the building's tenants had been harassed in the past and continued to be harassed (7a-8a). Concerning tenant harassment by petitioner, the present owner, the hearing officer expressly found that the presence of squatters and lack of building security contradicted petitioner's stated intent not to force out the remaining tenants, that the

current conditions disturbed the tenants, that evidence of payment for janitorial services was insufficient to rebut the tenant's testimony of lack of services, and that petitioner was not providing essential services (7a-8a). The hearing officer held that a current owner must be responsible for the harassment of prior owners to avoid the possibility of sham transfers of property (4a-5a). However, the hearing officer did not rule on whether a current owner's responsibility for harassment by previous owners would be limited to "recent" harassment or would extend indefinitely backward in time. The Special Clinton District, with the attendant no-harassment requirement, was established in 1975. In this case, the HPD hearing officer found, in addition to finding that petitioner itself had harassed tenants, that harassment

attributable to previous owners had occurred from 1976 to 1983 (6a-7a).

HPD adopted the hearing officer's findings of harassment and denied petitioner's application for certification of no harassment (54a). Petitioner was served with the findings and with HPD's determination and then commenced this Article 78 and declaratory judgment action (9a). Special Term did not decide whether petitioner should be granted the relief sought but transferred this proceeding to the New York Supreme Court, Appellate Division, First Department, under sections 7803(4) and 7804(g) of the New York Civil Practice Law and Rules (64a) since the proceeding presented the issue of whether HPD's determination was supported by substantial evidence in the record.

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Petitioner included no additional proof in its Article 78 petition concerning the value of its building.

The New York Supreme Court, Appellate Division, First Department, confirmed, without opinion, HPD's determination, which had denied petitioner certification of no harassment (66a). Petitioner then appealed as of right to the New York Court of Appeals from the Appellate Division order; however, the appeal was dismissed sua sponte by the Court of Appeals (after the parties submitted letter briefs) upon the ground that no substantial constitutional question was directly involved (68a-71a).

Petitioner next moved in the Appellate Division, First Department for leave to appeal to the New York Court of Appeals on the grounds that section 96-109 of the Zoning Resolution was unconstitutional on its

face, that the HPD determination was obtained without procedural due process, and that the evidence was insufficient as a matter of law to sustain HPD's determination (73a). The Appellate Division denied that motion (83a).

Petitioner then moved in the New York Court of Appeals for leave to appeal to that court, and the Court of Appeals denied that motion (84a-86a; 92a).

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REASONS FOR DENYING THE WRIT

SECTION 96-109 OF THE NEW YORK CITY ZONING RESOLUTION IS NOT UNCONSTITUTIONAL ON ITS FACE, SINCE, TO PRESERVE THE SOCIO-ECONOMIC CHARACTER OF THE SPECIAL CLINTON DISTRICT IN THE FACE OF RAPID GENTRIFICATION, THE SECTION PERMITS BUILDING RENOVATIONS THAT REQUIRE AN ALTERATION PERMIT ONLY IF THE TENANTS IN THE BUILDING HAVE NOT BEEN HARASSED.

(1)

This Court should adopt the New York Court of Appeals' ruling that this case does not involve a substantial constitutional issue. In arguing that on its face section 96-109 of the New York City Zoning Resolution is an unconstitutional taking under the Fifth and Fourteenth Amendments because it permits current owners to be held responsible for the harassment of prior owners and because it prohibits improvements to petitioner's property "in perpetuity" (Petition at 12-13), petitioner ignores the basis of the agency

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determination that it challenges and two intrinsic features of zoning law. First, the HPD hearing officer found that petitioner itself had harassed tenants. No further finding was necessary for HPD to deny petitioner certification of no harassment. Thus, petitioner has no basis for arguing that it should not be held responsible for the harassment of previous owners. Second, the zoning features that petitioner ignores are that zoning restrictions run with the land and that zoning restrictions invariably impose "permanent" restrictions, at least for the foreseeable life of the zoning restriction. Neither feature renders zoning ordinances unconstitutional. See Agins v. City of Tiburon, 447 U.S. 255, 262-63 (1980). (ordinances, not limited in time, restricted development of land); Sadowsky v. City of New York, 732 F.2d 312, 318, 319 (2d Cir., 1984) (statutory certainty that subsequent

owners will be held responsible deters harassment); Pompa Construction Corp. v. City of Saratoga Springs, 706 F.2d 418, 422-23 (2d Cir., 1983) (ordinance permanently prohibited commercial use for which owners had purchased land).

A zoning ordinance that regulates the use of land is not an unconstitutional taking of private property if it substantially advances a legitimate state interest and does not deny an owner economically viable use of his land. U.S. v. Riverside Bayview Homes, Inc., ___ U.S. ___, 106 S. Ct. 455, 459 (1985), citing, Agins v. City of Tiburon, supra, 447 U.S. at 261. In Agins, this Court upheld, as advancing a legitimate state interest, the zoning restriction enacted by the City of Tiburon, California, to protect its residents from the ill effects of urbanization. The restriction limited to between one and five the number of

single-family residences that could be built on a five-acre tract of land. The landowners in Agins had bought their land before Tiburon amended its zoning requirements. Thus, although the zoning resolution permanently restricted development of the land by limiting the number of houses that could be erected, this Court found the zoning ordinance to be constitutional.

Similarly, in this case, to combat the problems of urbanization and gentrification of previously low-rent areas in New York City, article IX, Chapter 6 of the New York City Zoning Resolution was enacted to create the Special Clinton District and to permit rehabilitation of existing buildings and new construction consistent with the current existing scale of the community and "at rental levels which will not substantially alter the mixture of income groups presently residing in the area." Zon. Res. §96-00(a),

(b) (emphasis added). New York City is empowered by section 20(25) of the New York General City Law to regulate, inter alia, the location of buildings and the uses for which buildings may not be erected or altered.

Section 96-109 of the Zoning Resolution attempts to insure this goal of preserving the existing character and income mixture of Clinton and its residents by providing that the New York City Buildings Department will not issue an alteration permit for other than incidental alteration unless HPD certifies that the building owner, before evicting or otherwise terminating the tenancy of any tenant, (1) notified HPD of its intent to alter, (2) engaged in lawful relocation and eviction practices, and unless (3) HPD certifies that "no harassment has occurred." Preserving the character of a neighborhood also is a legitimate zoning purpose. N.Y.

Gen. City Law § 20(25); Marcus Associates, Inc. v. Huntington, 45 NY2d 501, 507, 382 NE2d 1323,_____, 410 NYS2d 546, 548 (1978) (preserving even the industrial character of a neighborhood is a permissible goal).

The cases cited by petitioner in support of its argument that a zoning ordinance must be limited in time (Petition at 14-18) are inapposite. In two of the cases, the municipalities had enacted temporary moratoria on certain types of development until the municipality could study completely the effect of development on the area. See Schafer v. City of New Orleans, 743 F.2d 1086, 1089, 1090 (5th Cir., 1984) (Petition at 16); Smoke Rise, Inc. v. Washington Suburban Sanitary Commission, 400 F. Supp. 1369, 1386-90 (D. Md., 1975) (Petition at 16). In Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956, 962 (1st Cir., 1972) (Petition at 17), a cluster zoning

restriction was upheld on the theory that it was a "stop-gap" measure until "more homework" could be done by the parties to support a permanent restriction. None of those cases involved a comprehensive zoning plan implemented after a full study as was section 96-109 of the New York City Zoning Resolution implemented in this case.

Petitioner does not even suggest that section 96-109 was implemented without an adequate study or for an illegitimate purpose. Thus, petitioner's challenge to section 96-109 rests solely on its claim that the section has rendered its property economically worthless. First, it apparently reasons that holding it responsible for a prior owner's harassment impermissibly defeated its expectations of a reasonable return on its property. Second, it claims that the permanent prohibition of a certain type of development, i.e., development that

requires an alteration permit, has rendered its property economically worthless.

(2)

Concerning petitioner's claim that section 96-109 of the Zoning Resolution impermissibly holds it responsible for a prior owner's harassment, petitioner ignores that the HPD hearing officer found that petitioner had harassed tenants in addition to finding that previous owners had harassed tenants. Thus, there is no basis for petitioner to challenge section 96-109 on the hypothetical ground that it might be held responsible for a previous owner's harassment.

In any event, the Second Circuit in Sadowsky v. City of New York, supra, 732 F.2d at 319, rejected a claim that New York City Local Law 19 was unconstitutional because it denied certification of no harassment to current owners if previous

owners had harassed tenants. New York City Local Law 19, 4 Administrative Code of the City of New York, §D26-40.06, regulated the renovation and demolition of SRO buildings. Local Law 19 was similar to section 96-109 of the Zoning Resolution in that Local Law 19 required certification that no harassment of tenants had occurred on the premises during a three-year inquiry period preceding an application to alter, renovate, or demolish an SRO. In Sadowsky, the plaintiffs had acquired title to their property in 1983, after Local Law 19 was enacted, just as petitioner in this case purchased his property in 1983, after the enactment of Section 96-109 of the New York City Zoning Resolution in 1975. While the Court of Appeals for the Second Circuit agreed that the effect of Local Law 19 might be to punish the plaintiffs for harassment they had

not committed, the Court found (732 F.2d at 319):

> [A]s a general matter the equities do not favor appellants. Under the legislative scheme implicit in [Local Law 19], statutory certainty serves as a deterrent to harassment. That is, in SRO's where harassment is found, the City will refuse to authorize renovation or demolition for three years. Further, since the certification requirement runs with the land, this certainty inhibits the prospects of selling these buildings for redevelopment purposes.... Appellants... ask the court to prevent a harm which they themselves might have prevented, had they chosen to act consistently with the legislative scheme.

Like the Sadowsky plaintiffs, petitioner purchased the building after section 96-109 was enacted and, thus, it was aware of the restrictions controlling the use of property in the Special Clinton District. Its expectations of what a reasonable return on its property would be under those restrictions could not reasonably include that petitioner could fail to provide building

security and other essential services to the current tenants while constructing around such deterioration a "top to bottom" renovation. See Sadowsky v. City of New York, supra, 732 F.2d at 317 (plaintiffs, who purchased property three weeks after regulating ordinance was enacted and three months after ordinance first received media publicity, lacked reasonable basis for expecting no obstacles to development of the property).

In this case, as in Sadowsky, supra, statutory certainty insures that harassment of tenants will not occur to thwart the purpose of maintaining Clinton as a neighborhood of mixed-income residents, one of the express goals of Article IX, chapter 6 of the Zoning Resolution. As a practical matter, the ordinance will not punish current owners for harassment occurring in the distant past since the problems of proving

that harassment occurred in the distant past will militate against a court or administrative finding that a current owner should be responsible for another's distant transgressions. In addition, the Special Clinton District was established only 12 years ago, in 1975, and harassment occurring before 1975 would not result in the denial of certification of no harassment to a current owner.

In any event, in Agins v. City of Tiburon, supra, 447 U.S. 255, this Court upheld a zoning restriction permanently restricting the development of land, and petitioner in this case could have avoided being held responsible for the prior owner's acts by not buying the property.

(3)

Nor did petitioner meet its burden of proving that it was deprived of all economically beneficial use of its property.

When it argues conclusorily that section 96-109 of the Zoning Resolution has rendered its property of no resale value because no improvements can ever be made (Petition at 4), petitioner ignores that zoning ordinances are "invested with an exceedingly strong presumption of constitutionality" and that it, as the party challenging the ordinance as an unconstitutional taking, has the burden of proving beyond a reasonable doubt that the ordinance deprived it of all reasonable use of the property. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-596 (1962); Park Avenue Tower Associates v. City of New York, 746 F.2d 135 (2d Cir., 1984), cert. den. sub. nom., 40 Eastco v. City of New York, 470 US 1087 (1985).The owner must be denied all economically viable use of its land before the Courts will find that a taking has occurred because, as this Court has said, "[E]ven if the permit [to engage

in a particular use] is denied, there may be other viable uses available to the owner." U.S. v. Riverside Bayview Homes, Inc. supra, __U.S.__, 447 U.S. at 459.

In Goldblatt v. Town of Hempstead, supra, 369 US at 592, this Court held that a zoning ordinance which prohibited a beneficial use to which the property previously had been put was not unconstitutional, and in Park Avenue Tower Associates v. City of New York, supra, 746 F.2d at 139, the Second Circuit held that deprivation of a profit is not an unconstitutional taking. Thus, a zoning classification is not confiscatory if the zoned use permits a reasonable return on the property and merely prohibits the alleged most profitable use of the property.

In this case, petitioner made no showing that it could not realize a reasonable

return on its property by making incidental repairs, which do not require the no harassment certification, or even by selling the property. Rather, petitioner simply claimed that HPD's refusal to issue certification of no harassment results in "an owner not being allowed to do anything with his property forever." Yet, petitioner's architect testified that although the alteration plans called for the creation of new apartments and, indeed, a penthouse apartment, the building was structurally sound.

Petitioner introduced no proof that its building could not be sold. Petitioner also cited its receipt of a violation for having installed a new boiler and boiler room without an alteration permit as evidence that it cannot "use" its property (Petition at 6), yet petitioner offered no testimony that it had attempted to get a permit to install a

new boiler. Rather, petitioner's architect, who admittedly had nothing to do with the heating system, offered his opinion that petitioner "couldn't get a building permit...." In short, petitioner made absolutely no showing that it has been denied a reasonable return on its property by the application of section 96-109 of the Zoning Resolution to its property.

This case is unlike Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir., 1983) (Petition at 17), in which a portion of the plaintiff's property had been "frozen" for 14 years, preparatory to being condemned for use as a highway intersection. In holding that the "freezing" was an unconstitutional deprivation, the First Circuit observed that although the municipality and the landowner had negotiated a price for the admitted expropriation of property, the municipality

had not paid. Thus, there was no question in that case that there had been a taking. In this case, petitioner submitted only its conclusions that it can do "nothing" with its property and demonstrated only that it cannot do what it had planned. As this Court held in MacDonald, Sommer & Frates v. Yolo County, ___ U.S. ___, 106 S. Ct. 2561, 2567 (1986):

> Whether the inquiry asks if a regulation has "gone too far," or whether it seeks to determine if proffered compensation is "just," no answer is possible, until a court knows what use, if any, may be made of the affected property.

Since petitioner has not demonstrated what can be done with its property, there is no basis for this Court to conclude that section 96-109 of the New York City Zoning Resolution effects a taking of petitioner's property.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

February 18, 1987

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No. 86-1153

IN THE

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OCTOBER TERM 1986

FBK REALTY CORP.,

Petitioner,

against

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

Petitioner's Reply Memorandum in Support of Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

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Respondent.

In his brief in opposition to *certiorari* the Respondent stresses three issues which require a reply from the Petitioner: (1) Petitioner's alleged relative lack of standing to raise the issue of vicarious liability; (2) the cases supporting broad police-power authority to regulate land use through zoning; and (3) the absence of "dollars and cents" proof of the extent to which Petitioner was deprived of the use and enjoyment of its property.

We intend to clarify these issues as follows: (1) the finding of "harassment" against the Petitioner is non-responsive and misleading; (2) the decision of the United States Court of Appeals in *Sadowsky v. City of New York*, 732 F.2d 312 (2d Cir. 1984) is inapposite; and (3) the circumstances of this case render the traditional police-power rationale and measurement-of-deprivation criteria inapplicable.

1. The Definition of "Harassment"

In the original petition we observed that we would assume, *ad arguendo,* the validity of the Respondent's finding that the Petitioner had itself "harassed" tenants at

the subject premises. Though, as noted, the administrative determination which produced that finding was highly tainted with violation of procedural due process of law (which the Respondent does not deny), that is not the point. As we have argued, if Section 96-109 of the Zoning Resolution is unconstitutional, it is thus *ab initio* and, as regards issuance of an Alteration Permit, the question of "harassment" was properly immaterial in the first instance.

Moreover, the word "harassment" has a negative emotional impact which might tend to prejudice even the most objective tribunal. The way in which the City of New York defines "harassment" should be clarified.

At page 7 of the Respondent's brief, "harassment" is defined as " * * * failure to maintain and repair, the failure to provide security, heat, and hot water, and inducing tenants to vacate apartments." Thus the Respondent has admitted that "harassment" constitutes a very broad spectrum of action and inaction; the expression includes acts which might, even unintentionally, have a conceivable tendency to encourage a tenant to vacate. "Harassment" thus includes not only the deliberate failure to provide all services required by city tenancy regulations, but also the *inability* (as here) to keep the premises impregnable against break-ins, and to provide janitorial services at a level subjectively acceptable to the Respondent, who sat as both judge and prosecutor below.*

2. *Sadowsky v. City of New York* Distinguished

The Respondent's reference to *Sadowsky v. City of New York*, 732 F.2d 312 (2d Cir. 1984) is entirely misplaced. So-called "Local Law 19" does preclude conversion of

* The record in this matter shows that, at the time the Petitioner bought the building, two of the several apartments in the building were occupied by tenants, and that those tenants are still in occupancy. The same is apparently true of the periods of ownership of the Petitioner's two immediate predecessors in title. Obviously, if the owners' acts were calculated to cause tenants to vacate, they were not very successful.

single-room occupancy buildings to other uses, based on prior "harassment." But that is where the similarity of Local Law 19 to Section 96-109 ends.

What the Respondent carefully fails to note is that Local Law 19 has a 3-year limitation period, going both ways. The statutory prohibition against those conversions may not be based on alleged "harassment" which took place more than three years before; similarly, the preclusion of conversions extends for only three years after the "harassment" finding.

Here, as previously noted, the examination into prior acts of alleged harassment extends, conceivably, to the time the building was first constructed, and the statutory prohibition against issuance of an Alteration Permit runs with the land forever.

The Respondent argues that, as a practical matter, difficulties of proof will preclude an examination of alleged "harassment" going back *too* far in the past. This argument is non-responsive, since Due Process is not something which may be permitted to depend upon vagaries of available proof. Moreover, since the Respondent *did* examine acts which took place over eight years prior to the hearing, and by two prior owners removed from the within Petitioner, the argument is also disingenuous.

3. The Inapplicability of the Police-Power Cases

In final support of his position, the Respondent cites the standard police-power cases, which generally uphold, in the face of constitutional challenge, zoning restrictions on land use. *See e.g., United States v. Riverside Bayview Homes, Inc.*, ___ U.S. ___, 106 S.Ct. 455 (1985); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Park Avenue Tower Associates v. City of New York*, 746 F.2d 135 (2d Cir. 1984), *cert.* denied *sub nom., 40 Eastco v. City of New York*, 470 U.S. 1087 (1985); *Pompa Construction Corp. v. City of Saratoga Springs*, 706 F.2d 418 (2d Cir. 1983).

In these cases, the property owner was prevented by law from utilizing property in the most profitable way, *i.e.*, by quarrying or by excavating close to the water line (*Pompa* and *Goldblatt);* by filling in wetlands (*Riverside Bayview*); or by using a large floor-area ratio (*Park Avenue Tower*). In all of these cases, one vital aspect was different from the situation presented in our petition: The property owners in these cases had *alternatives.* Though they were not as profitable as the precluded uses, there were other ways in which the owners could use their respective properties.

The within Petitioner has no such alternatives. Because of a myriad of other city and state rent laws, *the Petitioner must continue to operate the subject property as a residential multiple dwelling, and nothing else.* This situation must obtain for so long as the present tenants wish to occupy their respective apartments. Petitioner does not even have the relative luxury of razing the building and letting the land lie fallow. That is the very reason the Petitioner's renovation plans included a complete remodeling and renovation of the two occupied apartments, so that the present tenants could occupy them, as rent-controlled tenants, indefinitely.*

It is not simply the case, moreover, that the Petitioner has no alternatives in terms of use. The same city rent regulations put *affirmative* obligations upon Petitioner to provide a whole array of services to the tenants, which apply notwithstanding the tenants' failure to pay any rent for several years. Given the prohibition contained in Section 96-109, there is no way the Petitioner can lawfully remedy this situation.

The Respondent harps on Petitioner's ability to carry out "incidental" alterations and repairs. Our reply to this is twofold: First, there *is* no provision for such "incidental" alterations in any known law or regulation. Second,

* The Respondent's characterization of Petitioner's proposal as a "luxury" project is inaccurate.

Respondent does not deny that the entire heating, plumbing and electrical systems of the subject building require top-to-bottom renovation or replacement. Nor does he deny that failure to make such systemic repair or replacement itself constitutes "harassment" of tenants as defined by City law. But such repair or replacement *cannot* be effected without an Alteration Permit, which *cannot* issue, pursuant to Section 96-109, because of the finding of prior "harassment!"

This is the reason why the Respondent's references to the failure to establish the "extent" of the "deprivation" below, *MacDonald, Sommer & Frates v. Yolo County*, ___ U.S. ___, 106 S.Ct 2561 (1986), is such a cruel joke. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the subject property was limited to development as single-family homes, but at least that owner was permitted to do everything necessary to construct those homes pursuant to law and realize whatever financial profit might accrue from such development.

Here, pursuant to Section 96-109, Petitioner must, in perpetuity, operate the premises as a residential multiple dwelling, necessarily at a financial loss, without the legal ability to improve or upgrade essential systems for the benefit of the tenants, which was the ostensible reason for enactment of the statute in the first place.

The Respondent asserts that the courts are not permitted to second-guess local governments in the context of the public policy behind land use controls. So long as the controls "substantially advance legitimate state interests," *United States v. Riverside Bayview Homes, Inc., supra*, ___ U.S. ___, 106 S.Ct. at 459, we agree. But the controls set forth in Zoning Resolution Section 96-109 can only have the effect of keeping the so-called Clinton District a foul and decaying slum in perpetuity. Such will certainly not justify the statutory prohibition against any meaningful improvement of the Petitioner's property. Since the

prohibition thus constitutes a taking of Petitioner's property without compensation or a deprivation thereof without due process of law, the within Petition should be granted.

Respectfully submitted,

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Brief *Amicus Curiae* of the Community Housing Improvement Program, Inc., in Support of Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

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Statute Involved

Section 96-109 of the Zoning Resolution of the City of New York provides:

> Prior to the issuance of an alteration permit by the Department of Buildings for an alteration other than an incidental alteration for a *building* containing *residential uses* within the Preservation Area, the Administrator of Housing and Development shall certify to the Department of Buildings:
>
> (a) That prior to evicting or otherwise terminating the occupancy of any tenant preparatory to alteration, the owner shall have notified the Administrator of Housing and Development of his intention to alter the *building;*

(b) That the eviction and relocation practices followed by the owner of the *building* satisfy all applicable legal requirements and that no harassment has occurred.

(Italics in original as denoting terms defined elsewhere in Zoning Resolution.)

Interest of the Community Housing Improvement Program, Inc.

The Community Housing Improvement Program, Inc. ("CHIP") is a not-for-profit trade association representing 2,500 owners of regulated apartment buildings in the City of New York, including many in the Special Clinton District.

CHIP's primary objective as an organization is the preservation of privately-owned rental housing. CHIP's concern in the Special Clinton District is that Zoning Resolution 96-109 has precluded private investors from providing new or rehabilitated housing in the area.

It will be our purpose, in this brief, to show that the petition for a writ of certiorari brought by FBK Realty Corp. should be granted because Zoning Resolution 96-109 works to effect a taking of property without compensation. We will show that the Zoning Resolution does not serve a legitimate public benefit because it effectively prohibits rehabilitation of buildings in the Special Clinton District. We also demonstrate that as a result of the Zoning Resolution, FBK cannot reasonably use its property nor receive a reasonable return on same.

Summary of Argument

Zoning Resolution Section 96-109 (the "Resolution") is unconstitutional because it works to take an owner's property without due compensation. The Resolution prohibits an owner from obtaining an alteration permit unless the Department of Housing Preservation and Development ("HPD") first issues a Certificate of No Harassment. HPD defines "owner" as any individual or entity in the chain of title.

Therefore, the acts of any predecessor-in-interest will be binding on the present owner. This is true even if the present owner did not harass and even if the present owner had no actual or constructive knowledge of the acts of its predecessor(s). As a result, the owner is left without any legal ability to improve a building or even to restore essential building systems.

The Resolution provides no legitimate public benefit. The building involved herein is representative of the many buildings in the area commonly known as "Hell's Kitchen." It was constructed around the turn of the century. Immediate repair and improvement is necessary.

FBK Realty Corp. ("FBK") has stated its good faith intention to repair and improve the property for the benefit of the present as well as prospective tenants. However, because of the Resolution, FBK cannot obtain an alteration permit. The building continues to deteriorate.

The Resolution's obstensible aim is to retain the character of the neighborhood and to preserve the mixed-income nature of the residents of Hell's Kitchen. This aim cannot be realized; operation of the Resolution mandates that the zoning district retain the character of a foul and decaying slum. Such result, we submit, is arbitrary and unconstitutional.

This is especially so because FBK's building must remain subject to residential use. FBK cannot convert the property to commercial use or even raze the building and sell the vacant land. Instead, the draconian impact of the Resolution requires that the building continue to deteriorate. Under these circumstances, FBK has been denied a reasonable use and return on its property.

ARGUMENT

This Court should grant FBK's petition for a writ of certiorari and should determine whether Zoning Resolution Section 96-109 is unconstitutional because it effects a taking of property without due compensation.

There is no precise rule which determines when property has been "taken" in a constitutional sense. See, *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). Because no rigid rules can be laid down to distinguish compensible losses from non-compensible losses under the Fifth Amendment,* each case must be judged on its own facts. See, *United States v. Caltex (Phillipines), Inc.,* 344 U.S. 149 (1952), *reh. den.* 344 U.S. 919 (1953); *United States v. Central Eureka Mining Co.,* 357 U.S. 155 (1958), *reh. den.* 358 U.S. 858 (1958). Such a factual inquiry calls, "as much for the exercise of judgment as for the application of logic." *Andrus v. Allard,* 444 U.S. 51, 65 (1979).

The inquiry also involves a weighing of public and private interests. See, *Agins v. City of Tiburon,* 447 U.S. 255, 260-261 (1980). When, as here, the application of a general zoning ordinance as applied to a particular property does not substantially advance legitimate state interests, a taking has occurred. See, *Nectow v. Cambridge,* 277 U.S. 183, 188 (1928). So too, a taking is present when application of the ordinance denies an owner economically viable use of his land. See, *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 138, n. 36 (1978). As we show, the Resolution does not substantially advance a legitimate state interest but rather insures that the Clinton District will remain subject to ruin and decay thus rendering a parcel of property located in the District virtually worthless.

---

* The Fifth Amendment to the United States Constitution provides in pertinent part: . . . nor shall private property be taken for public use, without just compensation. This prohibition is made applicable to the states pursuant to the Fourteenth Amendment. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978), *reh. den.* 58 L.Ed.2d 198 (1978).

A. No legitimate state interest is advanced when the resolution forecloses an owner from upgrading a decaying building in the Clinton District thereby insuring that the building will be subject to further deterioration.

As FBK's petition for a writ of certiorari shows, HPD interprets the Resolution to provide that a Certificate of No Harassment (a prerequisite to obtaining an alteration permit) must be denied when any predecessor of the present fee owner has committed an act of harassment. Thus, the present, or any future, fee owner cannot improve the property. Nor can the owner upgrade essential systems for the benefit of the present residential tenants.

At the harassment hearing, HPD was apprised that because the subject building was constructed around the turn of the century, many essential systems were in a ruined state and in need of replacement. FBK's architect noted that the present DC electrical system looked like it has been "chewed on" (20-21a). The rusted plumbing system was beyond repair. Indeed, because the plumbing joists had been put together with old solder, they could not be resoldered without decomposing the pipes. Repair of these systems, as well as replacement of the boiler system* requires the issuance of an alteration permit. Yet due to HPD's harassment finding (even if attributable to prior owners in the chain), FBK cannot obtain an alteration permit so long as the Resolution is in effect.

HPD's answer to FBK's Article 78 Petition sets forth their interpretation of the ameliorative purpose underlying the Resolution, to wit:

---

* The self-defeating nature of the Resolution is amply underscored by the boiler incident. FBK was alleged to harass due to a lack of heat and hot water. A new boiler would abate this condition. But an alteration permit is necessary to install a new boiler and none would issue because of the harassment finding. Nevertheless, FBK improved the building (and the habitability of the two tenants in the building) by replacing the boiler. Incongruously, however, FBK was cited for a Building Code violation, to wit: an illegal installation made without an alteration permit (FBK Petition at p. 6).

> *The regulations applicable to the Special Clinton District are designed to preserve and strengthen the low-rise residential character of the district.* They are also intended to maintain a mixture of income groups which were found to reside in the Clinton area at the time of adoption of the Special Clinton District (Paragraph 31, 37a) (emphasis supplied).

HPD's answer also provides that, "upgrading" (*i.e.*, alteration) of buildings which does violence to the socio-economic composition of the area's population is inconsistent with the goals of the district (62a).

We submit that this reasoning cannot withstand constitutional scrutiny. An already tenuous building need not be subject to further and needless deterioration. However, this is HPD's position. HPD's answer at paragraph 93 states in pertinent part:

> *. . . the subject premises may be maintained in the same manner that it has been occupied for many years, and comparable to the use to which hundreds of similar residential buildings in Clinton and throughout the City of New York are presently being put* (62a) (emphasis supplied).

It is hard to imagine any public benefit gained by allowing an already run-down building to deteriorate. The tenants in the subject building would benefit from repair and improvement. Indeed, at the hearing before HPD, FBK's president, Mr. Hefelfinger stated on the record that the tenants could remain in the building as long as they wished and the work would be performed in such a manner which would not require them to vacate (Petition at pp. 6-7).

Notwithstanding, FBK's good faith intentions, its building, as well as others in the Clinton District where a finding of harassment has been found, can never be improved.

A noted commentator in the area of zoning has observed in language which applies with particular force herein:

> Zoning ordinances enacted to achieve even a laudable objective will be disapproved when they impose restrictions so narrow as to prevent reasonable development of the land to which they apply. Anderson, *American Law of Zoning,* 2nd Ed., Section 3.26, p. 152.

We submit that the permanent nature of the prohibition imposed by the Regulation exacerbates and does not ameliorate the conditions it was enacted to abate. As such, the Resolution is not only unreasonable, but more importantly, it is unconstitutional. FBK's petition for a writ of certiorari should therefore be granted.

B. The Resolution denies FBK reasonable use and a reasonable return on its property.

In this case, FBK argues that the Resolution, as interpreted by HPD, results in an unconstitutional taking. If any harassment has occurred in the past (regardless of whether such harassment was done by the present owner), a Certificate of No Harassment will be refused. Absent such certificate an alteration permit can never be obtained. FBK, or any future owner, is therefore left with a decaying property which, as a matter of law, can never be improved or even repaired to any extent for which an alteration permit is required. This absolute bar, existing in perpetuity, also renders the property without any viable resale value.

HPD argues that the Resolution does not operate to deny FBK either reasonable use or a reasonable return on its property. We submit that HPD is mistaken on both scores.

As now Chief Justice Rehnquist explained in his dissenting opinion in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 149-150 (1978):

> A taking does not become a noncompensible exercise of police power simply because the government in its grace allows the owner to make some "reasonable" use of its property. *"[I]t is the character of*

> *the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines whether it is a taking". United States v. Cress,* 243 U.S. 316, 328, 61 L.Ed 746, 37 S. Ct. 380 (1917); *United States v. Causby,* 328 U.S., at 266, 9 L.Ed 1206, 66 S. Ct. 1062. See also *Goldblatt v. Hempstead,* 369 U.S. at 594, 8 L.Ed2d 130, 82 S. Ct. 987 (emphasis supplied).

We submit that the invasion of FBK's property rights is too onerous to pass constitutional muster.

In the context of the Fifth Amendment taking clause, the term "property" encompasses the entire group of rights inhering in a citizen's (ownership). *United States v. General Motors Corp.,* 323 U.S. 373, 378 (1945). "Property" thus, " . . . denote[s] the group of rights inherent in the citizen's relation to the physical things, as the *right to possess, use and dispose of it." "The constitutional provision is addressed to every sort of interest the citizen may possess." Id.* at 378 (emphasis supplied).

Plainly, neither FBK nor any present or future similarly situated owner will be able to make beneficial use of property in the Clinton District. A one-time finding of harassment, regardless of when and by whom it was caused, requires that a building be and remain subject to deterioration.

In this case, FBK's rent roll, consisting of two rent-controlled tenancies, is virtually non-existent. In stark contrast, FBK's tax obligations to the City of New York remain constant. Additionally, FBK remains obligated to keep the premises up to the standards set forth in the myriad of housing regulations for the City of New York. But compliance can never be fully achieved absent the issuance of an alteration permit. Taking the draconian impact of the Resolution to its logical extreme, the subject building may very well be abandoned and thus revert to the City of New York. This is an illogical result when considering that FBK seeks to improve the property.

HPD appears to ignore these practical realities arguing instead that the requirement that a permit be obtained cannot constitute a taking. This Court's decision in *United States v. Riverside Bayview Homes, Inc.*, ____ U.S. ____, 106 S. Ct. 455, 459 (1985), is instructive in this regard. Noting therein that a requirement that a permit be obtained for a certain use does not, standing alone, "take" the property, this Court went on to explain:

> . . . after all, the very existence of a permit system implies that permission may be granted, leaving the owner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. *Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.* (Emphasis supplied.)

In the situation at bar, a one-time finding of harassment bars the owner from ever receiving an alteration permit. The Resolution therefore does not imply that permission will be granted but rather mandates that permission be denied. Moreover, because of other statutory regulations concerning housing in New York City, the owner is not free to make other uses of his property. For instance, the owner cannot transform the property into commercial use. Similarly, the owner cannot raze the building and sell the vacant land. Instead, the owner must retain the residential use of the building, incur the attendant liability, but be forever foreclosed from improving same or even, as illustrated in this case, from repairing the essential services for the building.

Under these circumstances neither a reasonable use nor a reasonable return can be achieved.

We recognize, as did Chief Justice Rehnquist in *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 149, n. 13 (1978) that:

> Difficult conceptual and legal problems are posed by a rule that a taking only occurs where the property owner is denied all reasonable return on his property. Not only must the Court define "reasonable return" for a variety of types of property (farmlands, residential properties, commercial and industrial areas), but the Court must define the particular property unit that should be examined.

In this case, the New York State courts declined to make such a critical inquiry. For this and the other significant reasons stated above, FBK's petition for a writ of certiorari should be granted.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February 18, 1987

MOTION FILED
FEB 20 1987

No. 86-1153

IN THE

Supreme Court of the United States

October Term 1986

F B K REALTY CORP.

Petitioner,

—against—

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* ASSOCIATED BUILDERS AND OWNERS OF GREATER NEW YORK INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

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February 20, 1987

No. 86-1153
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

FBK REALTY CORP.,

Petitioner,

-against-

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

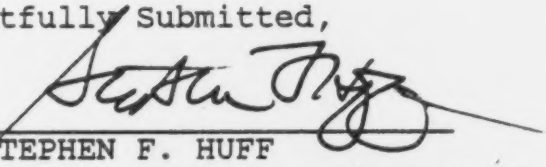
The Associated Builders and Owners of Greater New York, Inc. ("ABO") respectfully moves this Court for leave to file a brief in this case as amicus curiae. ABO is a not-for-profit corporation which represents approximately 450 persons and entities involved in the development and management of real estate in the City of New York. The consent of the attorney for the Petitioner herein has been obtained, but the attorney for the Respondent herein refused to consent to the filing of a brief by ABO.

The applicant, ABO, has an interest in this case because its members have an interest in the alienability, preservation and improvement of property within the City of New York, including the area which is embraced within the Zoning Resolution which is the subject of this action.

The Petition herein does not demonstrate that the Petitioner is necessarily a member of the class of innocent property owners whose interests are directly affected by the overly broad and confiscatory impact of the Zoning Resolution here at issue. (See page 10 of the Petition) Additionally, Petitioner's arguments do not sufficiently address the impact of the Resolution on the alienability of property as that Resolution affects such innocent property owners and which goes to the heart of the "taking without just compensation" issue under the

Fifth and Fourteenth Amendments to the United States Constitution. The applicant has no reason to believe that the argument on this point will be expanded and made complete in this Court by the parties to this action. If applicant's argument is adopted by this Court, ABO submits that the decision of the court below will be reversed.

Respectfully Submitted,

By 

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No. 86-1153
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CONSENT TO FILING OF AMICUS CURIAE BRIEF

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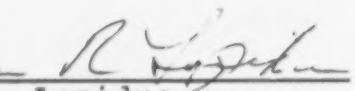
Respondent.

CONSENT TO FILING OF
AMICUS CURIAE BRIEF

Pursuant to Rule 36, the Petitioner in this matter, FBK Realty Corp. hereby consents to the filing by Associated Builders and Owners of Greater New York Inc. of a brief as Amicus Curiae.

By 
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OCTOBER TERM, 1986

FBK REALTY CORP.,

Petitioner,

-against-

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

BRIEF OF AMICUS CURIAE ASSOCIATED BUILDERS AND OWNERS OF GREATER NEW YORK INC.

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February 20, 1987

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Respondent.

Brief of Amicus Curiae Associated Builders and Owners of Greater New York Inc.

INTEREST OF THE ASSOCIATED BUILDERS AND OWNERS OF GREATER NEW YORK INC.

Associated Builders and Owners of Greater New York Inc. ("ABO") is a not-for- profit corporation which represents approximately 450 persons and entities involved in the development and management of real property, including residential property, in the City of New York. By virtue of the regular dealings

in New York real estate of the persons and entities which ABO represents, these persons and entities are integrally involved with the purchase and sale of property in New York and therefore are affected by questions of alienability and the ability to maintain and/or improve residential housing which are raised by the issues in this case.

SUMMARY OF ARGUMENT

This brief supports the instant Petition because Zoning Resolution 96-109 (the "Resolution"), as construed by the Department of Housing Preservation and Development of the City of New York ("HPD"), raises important constitutional issues. The operative effect of the Resolution is not only to render property unsaleable, but to subject such property to physical deterioration, all without any concomitant benefit to the welfare of the community. The Resolution therefore

deprives the owner of the value of his property due to no fault of his own and constitutes the taking of such property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The Resolution also violates principles of due process by virtue of the retroactive application of the critical terms at issue herein.

ARGUMENT

THE RESOLUTION VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS IN CONSTITUTING A TAKING OF PROPERTY WITHOUT JUST COMPENSATION

The Resolution, as construed by HPD, permanently interdicts any alteration to a building within the protected district (except possibly minor repairs) by the owner of such building if, after application to HPD for an Alteration Permit, it is found that any prior owner

in the chain of title committed even one act of "harassment" at any time with respect to any tenant who resided in the building during the period that the Resolution has been operative. For example, the Resolution would preclude an owner from obtaining a permit to install a new boiler or electrical and plumbing system (21a, 50a)* if one act of harassment some time in the past was found to have been committed. This itself would prevent effective maintenance of the building and render it a deteriorating asset, thereby precluding commercial enjoyment or a viable sale, as well as harming the building's residents who the Resolution is ostensibly intended to protect.

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*Parenthetical references are to pages in the Appendix to Petition for a Writ of Certiorari

This inequitable and illogical application of the Resolution is at the heart of the Decision of the Hearing Officer (3a-8a) - which was adopted by HPD and confirmed by the Court below - which, after finding that the term "owner" was not defined in the Resolution, construed that term to include "former owners." The Decision also held that if HPD can establish that "even one act of harassment occurred" by any such former owners, a permit to perform alterations must be denied. (5a) The Decision thereby greatly expanded the scope of the Resolution from that which is apparent from its face.

The operative effect of the Resolution is not only to prevent proper building maintenance, but to render real property in the protected district unsaleable. Specifically, a purchaser of such property would be taking the

monumental risk that when, at some time in the future, he sought a permit to make alterations (which alterations would inevitably be required for operation, maintenance and refurbishing of a building), such permit would be unconditionally and permanently denied because of some isolated act of harassment in the past of which the purchaser had no knowledge or control. Under such circumstances, a prospective purchaser will surely not incur such risk and buy the property. Therefore, the prospect of a current owner being able to sell its building for any commercially realistic consideration is virtually eliminated, since no prospective purchaser could risk an investment which could literally become a deteriorating asset as a result of one unrecorded act of past "harassment" surfacing in the future.

The confiscatory effect of the Resolution as construed by HPD is therefore manifest. The Resolution literally renders unalienable any building in the district which has been denied an Alteration Permit or for which an application had not been made at the time of the prospective sale. As shown below, such result is in no fashion offset by any social benefit to the community which the Resolution purports to achieve.

In its Answer to the Petition in the original court proceeding, Respondent set forth the purported policy reason for the Resolution by stating "This provision is intended to remove the economic incentive to the harassment of residents of the [protected] neighborhood." (38a) If the Resolution were indeed limited to acts of harassment by the current owner making application for an Alteration

Permit or even to those current owners who, directly or indirectly, have acted in concert with a former owner committing acts of harassment, such policy would be understandable. However, it is difficult to conceive how a current owner who had absolutely no knowledge or reason to know of past acts of harassment will be deterred from himself committing such acts by enjoining him from the ability to make alterations to his building because of his predecessor's conduct. Far from achieving the stated policy, the operative effect of the Resolution is simply to place such an enormous economic risk on a prospective purchaser - the risk that such purchaser may not be able to make alterations in the event of a future finding of past harassment - as to render a building unmarketable. Indeed, this state of affairs can only contribute to the deterioration of any given

building and by extension to deterioration of the neighborhood. Thus, ironically the Resolution actually has a harmful effect on tenants, by eliminating what could be suitable housing facilities.

In his Decision, the Hearing Officer likewise sought to deal with the intended policy of the Resolution; but, like Respondent's Answer quoted above, his analysis fell short of the mark. After indicating that the Petitioner sought to limit the term "owner" to the current owner, the Decision then went on to state that "such a narrow definition would do no justice to the statute [i.e., Resolution 96-109] since an owner who willfully harassed tenants of a given building would then only have to transfer title to some other nominal owner in order to avoid the statute." (4a) However, the policy which that concern

seeks to foster could easily and more directly be protected by providing for a mechanism for HPD to ascertain whether a given transfer of title was made to evade the Resolution. The solution clearly must not be an overbroad and confiscatory penalty to an innocent owner who had no reason to know of past harassment when that owner purchased his property.

Significantly, a solution to accommodate both needs was implemented by this very Respondent in 1983 in remarkably similar circumstances, presumably to avoid the same constitutional infirmity which is inherent in the Resolution here at issue. In Sadowsky v. City of New York, 732 F.2d 312 (2d Cir. 1984), the Second Circuit affirmed the District Court's ruling that a New York City Local Law did not constitute the taking of property without just compensation. That Local

Law governed the renovation and demolition of single-room-occupancy buildings. It required a certificate from HPD that no harassment of tenants had occurred for a three-year period preceding application for a permit for renovation or demolition. In relevant part, the Law permitted a waiver of said certificate if HPD found that the purchaser or owner of record was not the owner when the harassment took place and did not participate in or encourage the harassment, and that the purchase was bona fide and not intended to evade the statute. Id. at 315.

In short, the Local Law which was the subject of Sadowsky had a three-year duration for acts of harassment and expressly provided for a waiver of its terms to protect innocent purchasers and to avoid a confiscatory result. Unlike that Law, the Resolution here at issue

permanently prohibits alterations upon the finding of harassment and does not protect a purchaser who is totally innocent of such harassment. As shown above, such a restriction effectively interdicts the alienability of the property, since no purchaser is likely to assume the economic risk that he will not be able to alter his building in the event of a future finding that a single act of harassment had occurred in the past. Also, the Resolution will preclude an innocent owner from making meaningful alterations and improvements, thereby rendering it a deteriorating asset.

As shown above, the Resolution in overall operation will inevitably have a devastating adverse impact on the investments of property owners in the protected neighborhood, as it constitutes an unconstitutional taking of their property See, e.g., Penn Central

Transportation Company v. City of New York, 438 U.S. 104, 124 (1978) ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations."); Agins v. City of Tiburon, 477 U.S. 255 (1980). Equally important, the Resolution will ultimately have the effect of removing otherwise viable - and badly needed - residential facilities.

In construing this Court's line of cases addressing themselves to whether a zoning ordinance constitutes the taking of property without just compensation, the Second Circuit has held the key question to be whether a property restriction is so burdensome as to inhibit others from purchasing the property for the permitted uses. See Park Avenue Tower Associates v. City of

New York, 746 F.2d 135, 139 (2d Cir. 1984), cert denied sub. nom. 40 Eastco v. New York, 470 U.S. 1087 (1985); Sadowsky v. City of New York, id. at 318; Pompa Construction Corp. v. City of Saratoga Springs, 706 F.2d 418, 424 (2d Cir. 1983). Here, the operative effect of the Resolution clearly is to render affected property unalienable and subject to deterioration. The Resolution is demonstrably infirm and should be stricken.

THE RETROACTIVE APPLICATION OF THE RESOLUTION VIOLATES DUE PROCESS

Even though Petitioner took title to the subject premises in October, 1983 (6a), Respondent's definition of the term "owner" to include the acts of past owners -- by virtue of which definition Petitioner has been penalized -- did not come into effect until 1984. Respondent

is therefore impermissibly giving a retroactive application to the especially "harsh and oppressive" consequences resulting from its belatedly-formulated definition. Under such circumstances, this ex post facto application of the Resolution as defined violates the due process clauses of the Fifth and Fourteenth Amendments. See Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966, 972 (2d Cir. 1985).

This additional constitutional infirmity precludes the application of the Resolution as presently - and broadly - defined to Petitioner and to any other affected owners who took title to their properties prior to the effective date of the relevant definition in 1984.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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